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No. _____

Supreme Court, U.S.
FILED
FEB 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1986

COMMONWEALTH OIL REFINING COMPANY, INC.,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petition for a Writ of Certiorari to The United States Court of Appeals for The Fifth Circuit

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February 23, 1987

QUESTIONS PRESENTED

1. Does a court of appeals err in adopting a standard "fundamentally at odds with the policies of flexibility and equity built into Chapter 11 of the Bankruptcy Code" condemned by this Court in *National Labor Relations Board* v. *Bildisco and Bildisco*, 465 U.S. 513, 104 S. Ct. 1188 79 L.Ed. 2d 482 (1984), and in failing to use the balancing test *Bildisco* mandates where bankruptcy policy conflicts with non-bankruptcy federal policy?

2. Does a court of appeals ignore this Court's recent holdings in *Midlantic Nat'l Bank vs. New Jersey Dept. of Environmental Protection*, ___ U.S. ___, 106 S.Ct. 755, 88 L.Ed. 2d 859 (1986) and *Ohio vs. Kovacs*, 469 U.S. 274, 105 S. Ct. 705, 83 L.Ed. 2d 649 (1985), when it fails to balance the costs to the bankruptcy trustee in complying with non-critical governmental regulation, with the benefits, if any, to be derived from such regulation?

3. Does a court of appeals err in affirming a district court's finding that any governmental environmental regulatory authority falls outside the "automatic stay" of the Bankruptcy Code, 11 U.S.C. §362(a) in the absence of any showing of imminent and identifiable harm?

TABLE OF AUTHORITIES

Cases

Page

In re Ilco, United States; Alabama, et al. v. ILCO, 48 B.R. 1016 (N.D. Ala. 1985) 17

In re Professional Sales Corp., 56 B.R. 753 (N.D. Ill. 1985) 18

Midlantic National Bank v. New Jersey Dept. of Environmental Protection, ____ U.S.____, 106 S. Ct. 755, 88 L.Ed. 2d 859 (1986) 7, 8, 9, 10, 13, 15, 16, 18

N.L.R.B. v. Bildisco and Bildisco, 465 U.S. 513, 104 S.Ct. 1188, 79 L.Ed. 2d 482, (1984) 7, 8, 9, 15, 18

Ohio v. Kovacs, U.S., 469 U.S. 274, 105 S.Ct. 705, 83 L.Ed.2d 649 (1985) 9, 15, 16

Penn Terra, Ltd. v. Dept. of Envt'l Resources, 733 F.2d 267 (3d Cir. 1984) 17

People v. Electrical Utilities, Inc., 41 B.R. 874 (N.D.Ill. 1984) 18

Texaco, Inc. v. Pennzoil Company, 626 F.Supp. 250 (S.D.N.Y. 1986) *aff'd,* 784 F.2d 1133 (2d Cir. 1986) 10

United States v. Johns-Mansville Sales Corp., 13 *Env. L. Rep.* 20310 (D.N.H. 1982) 12, 13, 14, 15

TABLE OF AUTHORITIES — (Continued)

	Page
Statutes	
11 U.S.C. § 101	5
11 U.S.C. § 362(a)	2, 16
11 U.S.C. § 362(b)(4)	11, 14, 15, 17
11 U.S.C. § 362(b)(5)	2, 12
28 U.S.C. § 157	2
28 U.S.C. § 158	2
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1291	2
28 U.S.C. § 1334	2
Title 12 P.R. Laws § 1121 (Puerto Rico Public Policy Environmental Act)	4
42 U.S.C. § 6901 *et seq.* (Resource Conservation and Recovery Act)	*passim*
42 U.S.C. §§ 6924 *et seq.* (Solid Waste Disposal Act)	5, 6
42 U.S.C. §§ 9604 and 9607 (Comprehensive Environmental Response, Compensation and Liability Act of 1980)	16, 18
40 C.F.R. § 270.14 *et seq.*	4

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The petitioner Commonwealth Oil Refining Company, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on November 25, 1986.

OPINIONS BELOW

The memorandum opinion of the Court of Appeals for the Fifth Circuit is reported at 805 F.2d 1175, and is reprinted in the appendix hereto, p. A-4, infra.

The opinion of the United States District Court for the Western District of Texas (Garcia, J) is unreported, and is reprinted in the appendix hereto, p. A-35, infra.

The opinion of the United States Bankruptcy Court for the Western District of Texas (Elliot, J.) is reported at 58 B.R. 608, and is reprinted in the appendix hereto, p. A-40, infra.

JURISDICTION

The jurisdiction of the bankruptcy court was invoked under 28 U.S.C. § 157 and 1334, petitioner having filed a petition for relief under Chapter 11 of the Bankruptcy Code and having filed a motion for determination of the application of the automatic stay as to respondent under 11 U.S.C. § 362.

The jurisdiction of the district court was invoked under 11 U.S.C. § 158a, petitioner having timely appealed the order of the bankruptcy court.

The jurisdiction of the Court of Appeals for the Fifth Circuit was invoked under 11 U.S.C. § 1291. The judgment of the Court of Appeals for the Fifth Circuit was entered on November 25, 1986, affirming the district court judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

11 U.S.C. § 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities of —

(1) The commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3), does not operate as a stay —

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

STATEMENT OF THE CASE[1]

Commonwealth Oil Refining Company, Inc. ("Corco") is the debtor-in-possession and acts as bankruptcy trustee in the reorganization proceeding bearing its name. It draws its corporate name from the Commonwealth of Puerto Rico, where its petrochemical complex is located (Movants Exhibit 1 in the bankruptcy hearing). Puerto Rico is, regrettably, an area of high unemployment (T. 26). About 1982, Corco was compelled gradually to reduce production and eventually to cease refining petroleum products altogether (T. 14, 96; Movants Exhibit 1). While in bankruptcy in a prior proceeding in the same bankruptcy court under Chapter XI of the former Act, Corco on November 18, 1981, applied for, and obtained from EPA, Part A of its permit to operate under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.* (The "interim status"

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[1] References to the record of testimony before the Bankruptcy Court are described as "T. ."

permit). Within two years of obtaining the interim status permit, Corco ceased refining operations. Since then Corco has not generated any hazardous wastes (T. 17-23, 32). Corco emerged from the Chapter XI proceeding.

On October 14, 1982, the Administrator of EPA authorized Puerto Rico to operate "Phase I" of the Hazardous Waste Program (including regulation of interim status facilities) in lieu of the Federal program, pursuant to Section 300(b) of RCRA, 42 U.S.C. § 6926(b) (T. 21-22). Puerto Rico operates its own state hazardous waste program under 42 U.S.C. § 6926(b) (T.21-22) and has published regulations for the control of hazardous and non hazardous solid waste pursuant to the Puerto Rico Public Policy Environmental Act, P. R. Laws Ann Tit. 12, § 1121 *et seq.* It has not complained of Corco (T. 21-22), and indeed opposed the entry of the bankruptcy court order which gives rise to this Petition.

EPA inspected the Corco site on March 23, 1984 and found "all concentrations were below the maximum concentrations considered to be EP toxic." (Movants Exhibit 1). This was still the case at the time of bankruptcy hearing (T. 21). The Puerto Rican authorities filed no complaints against Corco (T. 21-22). Corco received no complaints from any source suggesting any threat to health or environment (T. 23), and the government of Puerto Rico opposed the EPA's actions in the Bankruptcy Court (Tab 5.a).

On April 12, 1984, Corco received a demand letter from EPA requesting that Corco comply with EPA Part B permit procedures[2] or to shut down. The Puerto Rico Environmental Qual-

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[2] EPA Part B permit procedure consists of gathering general information and specific technical information, including design drawings, engineering studies certified by a registered professional engineer, chemical and physical analyses, contingency and closure plans. 40 C.F.R. § 270.14 through 270.29.

ity Board did not join in EPA's request (T. 22-23). Even though the record reflects that the EPA viewed Corco's alleged violation to be technical (T. 99-100) and not related to a present threat to the environment but rather to mere compliance with administrative regulations (T. 99-101) relating to Part B procedure (T. 96-99), the record also demonstrates that the financial cost of complying with the EPA's demands were from $500,000.00 for the Part B application to $1,000,000.00 for final closure (T. 25). Corco could not then submit to EPA its Part B application because it had not yet determined the type or extent of business it would operate as a reorganized company and because it was required to comply with the Bankruptcy Code in making such a business determination (T. 38-39, 67-68, 92-98).

On July 11, 1984, Corco filed for protection under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 et seq. When EPA refused to give Corco time to respond or comply, Corco filed its Motion for Determination of Applicability of the Automatic Stay in the United States Bankruptcy Court.

EPA informed the bankruptcy court that it intended to file an administrative complaint against Corco pursuant to RCRA for violations of Puerto Rico's Public Policy Environmental Act, sections 3004 and 305 of RCRA, 42 U.S.C. §§ 6924, 6925, and regulations under both statutes. (T. 102). It has since ordered Corco either to comply with the Part B permit procedure or to forfeit interim status under 42 U.S.C. §§ 6925(e), and to file and execute an EPA final closure plan no later than 15 days after termination of interim status. 40 C.F.R. § 265.112(e). (T. 100).

In the bankruptcy court, EPA in effect demanded that Corco prematurely commit either some $500,000 to comply with the Part B procedure or some $1,000,000 to comply with the EPA closure plan to shut down its entire facility (T. 97-98), without regard to the considerations of bankruptcy reorganization or to

any benefit to the public. The record there showed that Corco has repeatedly sought to reconcile demands by EPA with Corco's alternative plans for its future and its obligations to its creditors. (T. 26). Corco is now engaged solely in the terminalling and storage of petroleum products belonging to others (Movants Exhibit 1), and not refining. When it files a Plan of Reorganization under Chapter 11 in order to emerge from bankruptcy, its business may have changed (T. 25-28). The record shows that Corco would be wasting assets of the estate if it completed the EPA Part B permit procedure before formulating the business operations it will undertake and before obtaining the approval of creditors and the bankruptcy court to undertake those operations. (T. 38-39). Although EPA refused to allow any reasonable extension of time within which Corco can prepare for a plan of reorganization, the bankruptcy court found the automatic stay inapplicable.

The bankruptcy court's order was appealed to the United States District Court by Corco and the court-appointed Official Committee of Unsecured Creditors and the Indenture Trustee. The district court affirmed, basing its opinion on grounds later partly eschewed by the Court of Appeals for the Fifth Circuit.[3]

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[3] The district court had suggested that the case was moot in that Corco might have lost its "interim status" pursuant to an automatic termination provision in 42 U.S.C. § 6925(e)(2). There is no evidence of this in the record. Corco has not lost interim status under that provision, which applies by its terms only to "land disposal facilities." Corco is not a land disposal facility, and is litigating this very issue in the EPA administrative proceeding, *In Re Commonwealth Oil Refining Co., Inc.,* II RCRA-85-0301. The court of appeals wrote: "Whether the district court was correct in its conclusion, *or indeed whether it had before it a sufficient record on which to base such a determination,* are not questions we must resolve to determine whether this case is moot." 805 F.2d 1175 at 1181 (emphasis supplied). The court of appeals concurred with all parties that the case was not moot.

Corco together with the court-appointed Official Committee of Unsecured Creditors and the Indenture Trustee representing the corporation's public bondholders, argued that the Congress and the Court had mandated a balancing of burden to the bankruptcy trustee with any alleged benefit to the public or environment. Although Corco and the other appellants urged the court of appeals to use the balancing test announced in *N.L.R.B.* v. *Bildisco and Bildisco* 465 U.S. 513, 104 S. Ct. 1188, 79 L.Ed. 2d 482 (1984) and implicit in *Midlantic National Bank* v. *New Jersey Dept. of Environmental Protection*, _____ U.S. _____, 106 S. Ct. 755, 88 L.Ed. 2d 859 (1986), the Fifth Circuit rejected these recent Supreme Court precedents and found the narrow exception for regulatory proceeding was "not . . . limited to those situations where imminent and identifiable harm to the public health . . . is shown." In its view, any regulatory activity, no matter how burdensome or how lacking in benefit to the public, falls outside the automatic stay. It affirmed.

REASONS FOR GRANTING THE WRIT

I.

The Fifth Circuit's holding ignores the balancing test announced in *N.L.R.B.* v. *Bildisco and Bildisco* for resolving policy clashes between Chapter 11 and federal nonbankruptcy law.

The resolution of any competing interests, and especially those between environmental interests and economic interests, necessarily involves a weighing or a balancing of the interests and the values they subserve. This is especially so in bankruptcy. *See NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 104 S. Ct. 1188 at 1197 (1984). The Fifth Circuit's absolutist approach ignores this Court's earlier pronouncements requiring a

balancing of equities where the Bankruptcy Code confronts a nonbankruptcy federal policy. In *Bildisco*, 104 S.Ct. 1188 at 1196, this Court rejected a court of appeals' holding that it found would "present difficulties to the debtor-in-possession that will interfere with the reorganization process." This Court held the court of appeals' standard "fundamentally at odds with the policies of flexibility and equity built into Chapter 11 of the Bankruptcy Code." *N.L.R.B.* v. *Bildisco and Bildisco*, 104 S. Ct. at 1196. This Court chided the court of appeal for "subordinat[ing] the multiple, competing considerations underlying a Chapter 11 reorganization to one issue." *Id.* A balancing is required.

Corco is in midcourse of a complex bankruptcy reorganization, which if successful, will benefit the economy and people of Puerto Rico. The Court below, however, has held that Corco's efforts must be put in jeopardy by a questionable exercise in administrative compliance with no corresponding benefit to the environment, to public health or safety. Corco urges that only a balancing test assures that sensitive and important concerns of bankruptcy reorganization are not subjugated to costly but routine administrative interests of environmental authorities. Here, the bankruptcy court was sympathetic to Corco's plight (T. 97-101) but mistakenly viewed itself as powerless to stay any manner of environmental regulation. The drafters of the automatic stay, however, intended it to be construed broadly and its exceptions, including the one for governmental regulation, narrowly. 124 *Cong. Rec.* 32395, 33995 (1978). The effect of the opinions of the court of appeals is to reverse this Congressional mandate. This Court has recently allowed a limited environmental exception to be engrafted upon bankruptcy law, taking pains to call the exception "a narrow one". *Midlantic National Bank v. N. J. Dept. of Environmental Protection*, 106 S. Ct. 755 at 762n9. It conditioned its use, as all courts have before the opinion here on appeal, on a showing of

a risk to "public health or safety *from imminent and identifiable harm.*" *Id.* (emphasis added).

The court below improperly disregarded the necessity of integrating administrative enforcement of non-critical environmental compliance issues into the bankruptcy framework. It considered no benefits to be derived from the stay, and took no notice that the stay produced no harm to the public. On the contrary, the result of the court of appeals' opinion is to produce harm to Corco, its creditors and the people and economy of Puerto Rico, with no showing of benefit to anyone. Such a result strikes an impermissible balance, offends the equitable principles undergirding the Bankruptcy Code, and is "fundamentally at odds with the policies of flexibility and equity built into Chapter 11 . . " See *N.L.R.B.* v. *Bildisco and Bildisco*, 104 S. Ct. 1188 at 1196.

II.

The Fifth Circuit's absolute exemption for unnecessary regulatory activity conflicts with decisions of this Court requiring a showing of imminent and identifiable harm to the public and environment.

The Fifth Circuit ignores the recent decisions of this Court dealing with the national problem created by the conflicting demands of environmental protection and bankruptcy reorganization. *Midlantic National Bank v. New Jersey Dept. of Environmental Protection*, ___ U.S. ___ , 106 S.Ct. 755, 88 L.Ed. 2d 859 (1986); *Ohio v. Kovacs*, 469 U.S. 274, 105 S.Ct. 705, 83 L. Ed. 2d 649 (1985). Unlike the present case, each involved a "dump and run" situation in which a failed company left identifiable toxic wastes undisposed of.

In *Kovacs*, the corporate owner of a site was in receivership. State intervention was necessary to clean up the hazardous

site. The state sought to impose a monetary obligation resulting from clean-up upon an officer and stockholder of the corporation. Nonetheless, this Court held the obligation to clean-up properly involved matters of bankruptcy concern, and not solely of the environment. It held Kovacs' obligations dischargeable.

In *Midlantic National Bank*, this Court, faced with proposed abandonment of a toxic site by a trustee appointed by the bankruptcy court, created a limited exception to the trustee's usually unfettered abandonment power under 11 U.S.C. § 554(a) for those few cases where abandonment would thwart "laws or regulations . . . reasonably calculated to protect the public health or safety *from imminent and identifiable harm.*" 106 S. Ct. at 762n.9 (emphasis added).

The Fifth Circuit's opinion conflicts with this reasoned reconciliation. The *Midlantic* requirement of a showing of imminent and identifiable harm continues the consistent treatment given to environmental concerns arising in the reorganization context. There is a national concern, implemented in the uniform federal bankruptcy laws mandated by the Constitution itself, that the conflicting demands upon an insolvent estate be reconciled in the bankruptcy court. Reorganization is an important national concern. The success of a business enterprise often goes beyond the finances of the concerned entity or its owners. *Texaco, Inc. v. Pennzoil Company*, 626 F. Supp. 250 (S.D.N.Y.), *aff'd.*, 784 F.2d 1133 (2d Cir. 1986) ("The sudden death or dismemberment of a corporation, while it is not analogous to the sudden death of an individual, hurts the public interest . . . The consequent harm to Texaco will be shared by those members of the public whose welfare is dependent upon Texaco's continued existence as a vital wealth-generating economic organism.") For this reason, bankruptcy courts are given national, federal, exclusive jurisdiction to

oversee economic reorganization. Only in very limited circumstances is that authority displaced.

a. Congress intended the Automatic Stay to Apply to Regulatory Actions Generally

Congress designed the "automatic stay" provision, 11 U.S.C. § 362, to give debtors a "breathing spell", to protect them during the pendency of a bankruptcy case from creditor claims, from lawsuits, pending or threatened, and from other forms of harassment. *See H. Rep. No. 95-595*, 95th Cong., 2d Sess. 340, 1978 *U.S. Code Cong. & Ad. News* 5963, 6296. Congress clearly swept governmental action within the ambit of the automatic stay:

> (a) . . . a petition . . . operates as a stay, *applicable to all entities*, of —
>
> (2) the commencement or continuation, including the issuance of employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title . . .(emphasis supplied).

The decision of the court below centers upon the narrow exception enacted into 11 U.S.C. § 362(b)(4):

> The filing of a petition . . . does not operate as a stay —
>
> (4) under subsection (a)(1) of this section of the commencement or continuance of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power . . .

Legislative History reflects the clear and limited purpose of the subsection. Statements on the floor indicate that the

362(b)(4) exception "is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in the property of the debtor." 124 *Cong. Rec.* 32395 (1978) (Remarks of Rep. Edwards); 124 *Cong. Rec.* 33995 (1978) (Remarks of Senator DeConcini). *See. U.S.* v. *Johns-Mansville Sales Corp.*, 13 Env. L. Rep. 20310 at 20311 (D.N.H. 1982), citing this legislative history with approval. Thus, Section 362(b)(4) must be read in conjunction with § 362(b)(5), excepting from the general automatic stay, "the enforcement of a judgment, *other than a money judgment,* obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." Read together, the provisions provide a delicate balance, allowing the government to regulate in certain instances, but giving great weight to the Bankruptcy Code's paramount concern of protecting the bankruptcy estate from unnecessary financial burden. *See Ohio* v. *Kovacs*, 469 U.S. 274, 105 S. Ct. 705, 83 L. Ed. 2d 649 (1985). Thus, the scheme of the regulatory sections attempts to isolate a company's finances from unnecessary adverse regulatory action during bankruptcy proceedings.

b. A Present Ongoing Threat of Imminent and Identifiable Harm to Safety and Health is Required before the Governmental Regulation Exception may be Invoked.

The very legislative history shows that the government regulation exception was intended to be limited to cases where the government can show present ongoing pollution posing an imminent peril to the public.

> Under present [pre-Code] law there has been some overuse of the stay in the area of governmental regulation. For example, in one Texas bankruptcy court, the stay was applied to prevent the State of Maine from closing down one of

> the debtor's plants *that was polluting* a Maine River in violation of . . . [State law.] The bill [the 1978 Code] excepts these kinds of actions from the automatic stay . . . .

H.R. Rep. No. 595, 95th Cong., 2d Sess. 174-75, *reprinted in* 1978 U.S. Code Cong. & Ad. News 6135-36 (emphasis supplied). This is the clear message of this Court in *Midlantic National Bank* as well, ____ U.S. ____, 106 S. Ct. 755, 88 L.Ed. 2d 859 (1986) ("to protect the public health or safety from *imminent and identifiable harm*") (emphasis added). The record is clear that no pollution is taking place at Corco and that no "imminent" or "identifiable" harm exists.

The well-known case of *United States* v. *Johns-Mansville Sales Corp.*, 13 Env. L. Rep. 20310 (D.N.H. 1982), a case almost directly on point, stands for the same proposition. In *Johns-Mansville,* the government asked Mansville, then and now in Chapter 11 proceedings, to prepare a plan for covering disposal sites and mines, long extant and no longer part of Mansville's production process. The *Johns-Mansville* court took express note of the government's right and ability to use its own funds under the so-called "superfund" law, Sections 104 and 107 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9604 and 9607. Under "superfund," were a true and imminent threat to the environment present, EPA could itself clean up the offending site.

In *Johns-Mansville,* as in Corco, the government eschewed this obvious course in order to place the financial burden on the debtor attempting to reorganize itself. In so doing, there and here, the government intrudes into the area left by the Constitution and Congress to the bankruptcy courts, which are charged with the reconciliation of competing demands upon the reorganization debtor's asserts.

In *Johns-Mansville,* the Court noted that the attempt by the government at dressing up its enforcement threats in the garb of "injunction" or other "non-monetary" remedy is simply not determinative. The question is whether the government's action effectively imposes a "monetary obligation" on the reorganization debtor. The expense to the estate of even preparing a plan justified the imposition of the stay in *Johns-Mansville.* 13 Env. L. Rep. at 20311.

The *Mansville* court noted that the debtor was not being asked to cease present, demonstrably hazardous activity. This is Corco's situation precisely.

> *Were the circumstances of the instant case such that the relief sought was an injunction which would require Mansville to cease and desist from ongoing deposit of asbestos wastes* on real property sites in New Hampshire, together with the additional posting of modest performance bond to ensure compliance with such order, this Court would agree that the above-cited cases relied on by movants would indicate that such relief should not be stayed under 11 U.S.C. § 362(b)(4). *Unfortunately, this is not such a case. The circumstances herein depict federal and state governments which are either unable or unwilling to take the necessary financial steps to protect the public from what are long extant but apparently recently discovered dump sites containing hazardous wastes,* and the same plaintiffs are similarly unwilling to proceed against the current owners who are in possession of such sites. *Clearly the relief sought is directed against Mansville alone and will require it to divert substantial of its assets now held in the jurisdiction of a bankruptcy court from the claims of numerous creditors,* many of whom allege that they are themselves suffering serious physical debilitation as a result of the inhalation of asbestos fibers. *Cast in this light, it is clear to*

this Court that the exception from stay detailed in 11 U.S.C. § 362(b)(4) is not here applicable. (emphasis supplied).

Here, as in *Johns-Mansville,* there is no showing of a demonstrable, present threat to public safety sufficient to bring the narrow exception of Section 362(b)(4) into play. In fact, Corco is an even stronger case since the EPA has itself inspected Corco's site and found no toxicity. In the words of this Court, there is no "imminent and identifiable" threat to public safety or health. *Midlantic National Bank,* ____ U.S. ____ 106 S. Ct. 755 at 762n.9, 88 L.Ed. 2d 859 (1986). As in *Johns-Mansville,* the debtor, acting as trustee, is faced with a threatened regulatory proceeding, by a governmental agency either "unable or unwilling to take the necessary financial steps to protect the public from what are long extant but apparently recently discovered . . . sites containing hazardous wastes," and which seeks to impose a huge charge on the assets of a debtor now held in the jurisdiction of the Bankruptcy Court. Under a *Bildisco* balancing test, the result would be clear: Congress' intent embodied in § 362(a) would predominate and the enforcement action would be stayed pending reorganization.

c. This Court in *Midlantic National Bank* and in *Kovacs* Has Reaffirmed the Requirement that there be an Active Polluting Practice.

Although this Court in *Midlantic National Bank* and *Kovacs* addressed slightly different factual scenarios than the court in *Johns-Mansville,* the tenor is the same. To the extent the governmental action is aimed at the financial responsibility of the debtor, it amounts to the enforcement of a monetary obligation. "In reality," this Court wrote, citing the lower court in *Kovacs,* "the only type of performance in which Ohio is now interested is a money payment to effectuate the Chem-Dyne clean up." 105 S. Ct. at 710. On the other hand, this Court in

each case reserved the government's power over current, active polluting practices.

> "... [W]e do not hold that the injunction *against bringing further toxic wastes on the premises* or against any conduct that will contribute to the pollution of the site or the State's waters is dischargeable in bankruptcy ... *Ohio v. Kovacs, id.* at 711. (emphasis added).

This Court's concern in *Midlantic* was the same: the protection of the public weal against "identified hazard," 106 S. Ct. 755 at 762, or from "imminent and identifiable harm" 706 S. Ct. 755 at 762n.9. The EPA has striven to bring its enforcement proceeding within the letter of *Kovacs* and *Midlantic*. In so doing, if indeed it does, it misses the spirit of those cases. As the *Johns-Mansville* court recognized, the EPA is hoist on its own petard. An "imminent and substantial danger" to public health and safety triggers the "superfund" provision of CERCLA, which allows the government itself to clean up at its own expense, 42 U.S.C. § 9604(a)(1). In that event, there is no reason to proceed against Corco except to compel payment of a monetary obligation, 42 U.S.C. § 9607(a). *Kovacs* prohibits this. After *Midlantic*, this Court's directive is even clearer. "Imminent and identifiable harm" within the meaning of *Midlantic* is remarkably similar to the "imminent and substantial danger" provisions of "superfund". Only such an active and positive threat to the environment warrants total governmental ouster of the orderly processes of bankruptcy reorganization. A *Bildisco* balancing test would achieve this result.

Thus, *Kovacs'* rationale was misunderstood by the court below. Like the later *Midlantic* opinion, *Kovacs* limits regulatory intervention to active pollution posing imminent peril: "Plainly, that person or firm *may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such condition.*" 105 S. Ct. at 712 (emphasis supplied).

Since the record is clear that Corco poses no such imminent peril to the health and safety of the people of Puerto Rico, the narrow § 362(b)(4) exception to the stay is inapposite. The EPA is stayed from unnecessary, unregulated pursuit of the debtor. EPA's rights and duties to act in the public interest are not forfeited; they are simply channelled into the reorganization court. There, the EPA and Corco can work together, as the debtor-in-possession as trustee must with all its creditors, to achieve their common goals in the context of a plan of reorganization under the Bankruptcy Code.

Besides this Court's opinions, other cases emphasize the requirement that imminent harm is a prerequisite to displacing the ordinary and effective reorganization processes. *Penn Terra Limited* v. *Dept. of Environmental Resources of Pennsylvania*, 733 F.2d 267 (3d Cir. 1984) rested upon a finding that "DER seeks to force Penn Terra *to rectify harmful environmental hazards*." (emphasis supplied). *United States* v. *ILCO, Inc.*, 48 B.R. 1016 (N.D. Alabama 1985) underscores the fundamental distinction between reparation of past damages, made subject to bankruptcy jurisdiction in *Kovacs*, and protection from identifiable imminent harm, subject to external governmental regulation in *Midlantic*. In *ILCO*, the court found the governmental regulation exception to the automatic stay applicable only in the face of claims of *current active* "discharging of lead-contaminated wastewater" and actual "releasing [of] hazardous wastes into the environment at the ILCO site." 48 B.R. at 1018-1019. Moreover, the government's complaint included "the EPA's determination that the . . . site may present an *imminent and substantial endangerment* to public health and environment." 48 B.R. at 1019 (emphasis supplied). As in *Midlantic*, the ILCO Court's holding clearly rests upon this finding of a *present environmental hazard*:

> This court concludes that the complaint filed by the U.S., which seeks a court order compelling ILCO as well as other named defendants *to remedy environmental hazards*, constitutes an equitable action to prevent future harm, rather than an action to enforce a money judgment."

48 B.R. at 1024. See also *People v. Electrical Utilities, Inc.*, 41 B.R. 874 (N. D. Ill. 1984) in which the court allowed the state to obtain an injunction against toxic PCB spillage.[4] Here, the government's own report shows that there is absolutely no endangerment to the public health and environment. (Movants Exhibit 1). The Corco site, by the government's own report, is in a benign state. *See also In Re Professional Sales Corp.*, 56 B.R. 753 (N.D. Ill. 1985), where the Court permitted an EPA enforcement action based in part upon a finding that EPA had found "an imminent and substantial danger to the public health or welfare" and had been compelled under "superfund," 42 U.S.C. § 9604, to remove 7500 drummed and 37,500 gallons of hazardous waste from the site. Only in the court of appeals' decision below has the stay been applied upon a record demonstrating *no* identifiable or imminent harm to the public environment. "Speculative or indeterminate future harm" does not justify ousting the Trustee's ability to reorganize a business. *See Midlantic Nat'l Bank* v. *New Jersey Dept. of Environmental Protection*, 106 S. Ct. 755 at 762n.9 (1986). Under *Bildisco*, it "subordinates the multiple, competing considerations underlying a Chapter 11 reorganization to one issue" and is "fundamentally at odds with the policies of flexibility and equity built into Chapter 11." 105 S.Ct. at 1196.

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[4]Even then, the *Electrical Utilities* court held that to the extent the injunction requires expenditure of money by the estate, the state as environmental creditor would be treated as any other creditor. 41 B.R. 874 at 877.

CONCLUSION

The important national interest embodied in Section 362 of the Bankruptcy Code can only be met by balancing present harm to the State, the public and the environment, with the benefits to the State, the public and their economy incidental to successful reorganization of a financially ailing company. EPA has by its own evidence proven that there is no imminent and identifiable threat to health or the environment. Regulation must prove itself of some benefit before it may impair the Trustee's ability successfully to reorganize a business. With a record demonstrating a complete absence of threatening identifiable harm, the court of appeals erred in denying the Congressionally-mandated benefits of the automatic stay. Absent this critical showing, EPA's enforcement actions should be stayed pending reorganization. Consequently, a writ should issue and the judgment of the court of appeals be reversed.

Respectfully submitted,

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February 23, 1987

APPENDIX

APPENDIX

Contents

		Page
I	Judgment of the United States Court of Appeals for the Fifth Circuit	A-2
II	Opinion of the United States Court of Appeals for the Fifth Circuit	A-4
III	Memorandum Opinion of the United States District Court for the Western District of Texas (Garcia, J.)	A-35
IV	Memorandum Opinion for the United States Bankruptcy Court for the Western District of Texas — San Antonio Division (Elliott, J.)	A-40

I

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-2827

D. C. Docket No. SA-85-CA-2044

IN THE MATTER OF:
COMMONWEALTH OIL REFINING CO., INC., *Debtor.*

COMMONWEALTH OIL REFINING COMPANY,
INC. AND OFFICIAL COMMITTEE OF
UNSECURED CREDITORS,

Appellants

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Appellee.

Appeal from the United States District Court for the Western District of Texas

Before GEE, RANDALL AND DAVIS, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that appellants pay to appellee, the costs on appeal to be taxed by the Clerk of this Court.

November 25, 1986

A true copy

Test GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit

By RAYMOND WAQUESPACK
DEPUTY

New Orleans, Louisiana

Issued as Mandate: December 17, 1986

II

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 85-2827

IN THE MATTER OF
COMMONWEALTH OIL REFINING CO., INC., DEBTOR

COMMONWEALTH OIL REFINING COMPANY, INC., ET AL.,
Appellants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Appellee.

No. 85-2828

IN THE MATTER OF
COMMONWEALTH OIL REFINING CO., INC., DEBTOR

OFFICIAL COMMITTEE OF UNSECURED CREDITORS, ET AL.,
Appellants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Appellee.

Appeals from the United States District Court for the Western District of Texas

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NOVEMBER 25, 1986

Before GEE, RANDALL and DAVIS, *Circuit Judges.*

RANDALL, *Circuit Judge:*

Appellants, Commonwealth Oil Refining Company, Inc. (CORCO), the debtor-in-possession, the Committee of Unsecured Creditors, and the Indenture Trustee, appeal from the district court's order affirming the bankruptcy court's decision that the United States Environmental Protection Agency's (EPA) administrative action to bring CORCO into compliance with federal and state environmental laws is exempt from the automatic stay provision of the Bankruptcy Reform Act of 1978 (Bankruptcy Code), 11 U.S.C. § 362(a), and should not be stayed under § 105 of the Bankruptcy Code. We affirm.

I.

This case presents the question of whether a debtor, who has filed a petition under Chapter 11 of the Bankruptcy Code, can be forced to comply with federal and state environmental laws designed to protect the public health and safety, before that debtor has filed its plan of reorganization.

Congress enacted the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-6991, to regulate the treatment, storage, and disposal of hazardous wastes by monitoring wastes from their creation until their permanent disposal. The objective of the RCRA is "to promote the protection of health and the environment and to conserve valuable material and energy resources." 42 U.S.C. § 6902. Section 3005 of the RCRA, 42 U.S.C. § 6925, requires that the facilities which treat, store, or dispose of hazardous waste obtain a permit from the EPA or from an authorized state. Such permits are to be issued only upon a determination that the facility is in compliance with the § 3004 hazardous waste management standards, *see* 42 U.S.C. § 6924 and 40 C.F.R. Part 264, and the § 3005 hazardous waste permit requirements, *see* 42 U.S.C. § 6925 and 40 C.F.R. Part 270.

Congress recognized that the EPA would not be able to issue permits to all hazardous waste management facilities before the permit program became effective. Therefore, it provided in § 3005(e) of the RCRA, 42 U.S.C. § 6925(e), that certain facilities would be treated as having been issued a permit until final administrative disposition of their permit application could be made. A facility obtains this "interim status" if it meets the following three requirements set out in § 3005: (1) that the facility was in existence on November 19, 1980 or on the effective date of statutory or regulatory changes that render the facility subject to the permit requirement; (2) that the facility has complied with the preliminary notification requirements of RCRA § 3010(a), 42 U.S.C. § 6930(a); and (3) that the facility filed a permit application conforming with EPA regulations.[1]

The EPA has promulgated regulations setting out the requirements for the permit application which must be filed as a prerequisite to interim status. *See* 40 C.F.R. §§ 270.1-.2, 270.10-.73. The regulations require that an existing facility first submit Part A of its permit application. *See* 40 C.F.R. §§ 270.1(b), 270.10(e). Part A requires general descriptive information about the facility, such as its location and the processes the facility uses in the treatment, storage, and disposal of hazardous waste. *See* 40 C.F.R. § 270.13.

For the interim status facilities, the actual permitting process begins when the EPA requests that the facility submit the second part of the permit application, known as "Part B." *See* 40 C.F.R. §§ 270.1(b), 270.14. Part B consists of specific

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[1] Facilities with interim status must comply with interim status standards set forth at 40 C.F.R. Part 265 or with the analagous provisions of an authorized state program. Interim status facilities "are not relieved from complying with other state requirements." 40 C.F.R. § 270.1(b).

information concerning the individual site and the operation of the facility that will indicate compliance with the technical standards and form the basis of the decision to issue or deny the permit and establish site-specific permit conditions. *See* 40 C.F.R. § 270.14.[2] The EPA has the authority to call in Part B at any time. The facility owner has six months from the date of the EPA's request to submit the technical information required by Part B. 40 C.F.R. § 270.1(b).

Failure to furnish the information necessary for final permitting within the time provided is grounds for the termination of interim status. 40 C.F.R. § 270.10(e)(5). Additionally, under the 1984 amendments to the RCRA, each "land disposal facility" operating under interim status prior to November 8, 1984, must submit a Part B permit application and a certification of compliance with all applicable groundwater monitoring and financial responsibility requirements by November 8, 1985, in order to retain interim status after that date. 42 U.S.C. § 6925(e)(2). Facilities that lose their eligibility to operate under interim status must cease acceptance of hazardous waste for treatment, storage, or disposal, and must commence closure activities. *See generally* 40 C.F.R. §§ 265.112(c), 265.113. No later than 15 days after a facility loses its interim status, it must submit a closure plan to the Regional Administrator. 40 C.F.R. § 265.112(c).

On October 14, 1982, the administrator of the EPA authorized Puerto Rico to operate Phase I of the hazardous waste program in lieu of the federal program, all as contemplated by

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[2] Part B consists of general information and specific technical information, including design drawings, engineering studies certified by a registered professional engineer, chemical and physical analyses, and contingency and closure plans. *See* 40 C.F.R. §§ 270.14-.29.

§ 3006(b) of the RCRA, 42 U.S.C. § 6926.[3] To implement Phase I, Puerto Rico has promulgated regulations. [4]Although Puerto Rico operates its own Phase I program, § 3008 of the RCRA, 42 U.S.C. § 6928, authorizes the EPA to enforce the provisions of Puerto Rico's program.

On August 13, 1980, CORCO advised the EPA that it conducts activities at the facility involving "hazardous waste," as defined in § 1004(5) of the RCRA, 42 U.S.C. § 6903. On November 18, 1980, CORCO submitted a completed Part A, thereby obtaining interim status. CORCO engaged in its refinery operations until March 3, 1982. Upon ceasing refinery operations, CORCO rented its storage tanks to various industrial companies for storage of fuel oil, gas and liquified natural gas. On April 12, 1984, the EPA called in CORCO's Part B application and set October 12, 1984, as a deadline for filing. CORCO requested and received an extension to December 7, 1984. On July 11, 1984, CORCO filed a petition under Chapter 11 of the Bankruptcy Code. On December 11, 1984, CORCO

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[3] The EPA may authorize a state to operate its own hazardous waste program in lieu of the federal program. On October 14, 1982, the EPA authorized Puerto Rico to operate Phase I of the hazardous waste program. 47 *Fed. Reg.* 45880. Phase I allows states to administer a hazardous waste program that covers identification of hazardous waste and interim status standards in lieu of the federal program covering those areas. *See* 40 C.F.R. § 271.121(b). Puerto Rico was never authorized to operate Phase II which consists of a permit program for hazardous waste treatment, storage, and disposal facilities. *See id.* Therefore, authority for requesting permit applications and issuing permits to hazardous waste facilities in Puerto Rico has always rested with the EPA.

[4] These regulations were issued pursuant to the Puerto Rico Public Policy Environmental Act (Law No. 9 of June 18, 1970, as amended) P.R. Laws Ann. tit. 12, § 1112 *et seq.* (PRPPEA).

informed the EPA that it would not submit its Part B application or a closure plan.

The instant law suit began when CORCO filed a motion for an order determining the applicability of the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362(a)(1), to an impending enforcement action by the EPA under § 3008 of the RCRA, 42 U.S.C. § 6928. In the alternative, CORCO moved for an order staying the EPA's enforcement action under 11 U.S.C. § 105. The EPA opposed both motions.

After a hearing during which CORCO's vice-president acknowledged that CORCO had failed to install a groundwater monitoring system and had not conducted groundwater testing as required by Puerto Rico's regulations, and that CORCO had never filed a Part B application, the bankruptcy court, on May 17, 1985, determined that the EPA's impending enforcement action was not subject to the automatic stay provision of 11 U.S.C. § 362(a)(1) and that no stay should issue under 11 U.S.C. § 105(a) because CORCO had failed to show a likelihood of success on the merits. *See* 58 B.R. 608 (Bankr. W.D. Tex. 1985).

On July 1, 1985, the EPA issued an administrative complaint against CORCO, citing it for violations of both the RCRA and the PRPPEA, and the regulations promulgated under both statutes. Among those violations cited were CORCO's failure to submit Part B or a closure plan and its failure to install, operate, and maintain a groundwater monitoring system and groundwater sampling and analysis. The EPA issued a compliance order against CORCO providing as follows: (1) that CORCO shall within ninety days from the date of the complaint make a decision to file either a closure plan within thirty calendar days from decision or a Part B permit application by November 8, 1985; and (2) that CORCO shall within thirty days from the date of the complaint cease to act as a treatment,

storage, and disposal facility, unless CORCO elects fo file a Part B permit application and complies with certain provisions of Puerto Rico's regulations.

The EPA then moved for leave to file an amended administrative complaint to reflect that CORCO had lost its interim status as of November 8, 1985, by operation of the 1984 amendment to the RCRA, 42 U.S.C. § 6925(e)(2). Leave to file the amended adminstrative complaint was granted. The amended complaint alleged the same basic factual allegations as those alleged in the original adminstrative complaint, but added a cause of action. The amended complaint alleges that CORCO is in violation of § 3005(a)(2) of the RCRA, 42 U.S.C. § 6925 (e)(2). The EPA issued a new compliance order, providing as follows: (1) that CORCO shall henceforth not treat, store, or dispose of any hazardous waste without first having obtained a permit from the EPA; (2) that CORCO shall have thirty days to submit a closure plan for its land disposal facilities and slop oil tank pursuant to the requirements of 40 C.F.R. § 266.112; and (3) that CORCO shall have thirty days to submit a post-closure plan for its land disposal facilities pursuant to the requirements of 40 C.F.R. § 266.118.

The district court, in its November 5, 1985 opinion, affirmed the bankruptcy court's decision, noting that it occured to the court that the entire appeal may be moot by virtue of the automatic termination provision of 42 U.S.C. § 6925(e)(2). The district court found that since CORCO did place hazardous waste in a surface impoundment, its plant in Puerto Rico is a land disposal facility. The court noted that regardless of the outcome of the appeal, the debtor would, by congressional mandate, lose its interim status on November 8, 1985 (just three days from the date of the opinion), unless it complied with the conditions set out in § 6925. The court considered it "most likely" that CORCO would not or could not comply.

The district court affirmed the bankruptcy court's holding that the EPA's enforcement action was not stayed by the automatic stay provision of the Bankruptcy Code. The court also affirmed the bankruptcy court's holding that CORCO had failed to establish the prerequisites necessary for a stay under § 105. The court stated that CORCO had conceded that it could not prevail on the merits, and noted that the automatic loss of interim status on November 8, 1985, also precluded success on the merits. Finally, the court noted that an injunction restraining enforcement of the environmental laws would disturb the public interest.

This appeal followed.

II.

We must first address the question raised, but not decided, by the district court, of whether this case is moot by virtue of the 1984 amendment to the RCRA, 42 U.S.C. § 6925(e)(2), which established November 8, 1985, as the date on which the interim status of a land disposal facility would terminate if the facility had not filed Part B and the required certifications of compliance with applicable groundwater monitoring and financial responsibility requirements. Raising the mootness question, the district court noted:

> It occurs to the Court that the entire appeal may be moot. The only issue is whether the EPA can force the debtor to file a Plan B or lose interim status and file a closure plan on its hazardous waste facility in Puerto Rico. Section 6925(e)(2) of Title 42 of the United States Code provides that the interim status of a land disposal facility shall terminate automatically on November 8, 1985 unless the owner or operator applies for a final determination regarding the issuance of a permit and certifies that such facility is in compliance with all applicable groundwater

> monitoring requirements. Since debtor did place hazardous waste in a surface impoundment . . . its plant in Puerto Rico is a land disposal facility. Title 11 U.S.C. Section 6924(k). Debtor has conceded it has not filed its Plan B and has not instituted a groundwater monitoring system . . . . It appears that regardless of the outcome of this appeal, debtor will, by Congressional mandate, lose its interim status on November 8th unless it complies with the above conditions, which it most likely will not or cannot do.

Commonwealth Oil Refining Co., Inc. v. United States Environmental Protection Agency, No. SA-85-CA-2044, slip op. at 2 (W.D. Tex. Nov. 5, 1985) [hereinafter cited as *Slip op.*]. However, the court did not resolve the mootness question, but rather, went on to decide that "[i]n any event, this Court finds, for the reasons set forth in [the bankruptcy court's] opinion, that EPA's enforcement action should not be restrained." *Id.*

Since the mootness question "strike[s] at the very heart of federal subject matter jurisdiction," decision of that question cannot be avoided. *Sannon v. United States,* 631 F.2d 1247, 1250 (5th Cir. 1980). We must, then, as a threshold matter, determine whether this litigation presents a "case or controversy" within the meaning of Article III of the Constitution.

To present a justiciable "controversy" within Article III, the dispute in question

> must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts . . . . Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised . . . .

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937) (citations omitted). Mootness is one of the doctrines derived from the essential adversarial requirement expressed in Article III. "If a dispute has been settled or resolved, or if it has evanesced because of changed circumstances, including the passage of time, it is considered moot." *In re S.L.E., Inc.*, 674 F.2d 359, 364 (5th Cir. 1982). "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome," but, "[w]here one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy." *Powell v. McCormack*, 395 U.S. 486, 496-97 (1969). A case is not moot so long as any claim for relief remains viable, whether that claim was the primary or secondary relief originally sought. *Id.* at 496 & n.8, 499-500.

The district court decided that CORCO is a land disposal facility so that its interim status terminated, by operation of law, on November 8, 1985. Whether the district court was correct in its conclusion, or indeed, whether it had before it a sufficient record on which to base such a determination, are not questions that we must resolve to determine whether this case is moot. There is an administrative proceeding underway in New York to resolve the question of whether CORCO is a "land disposal facility" within 42 U.S.C. § 6925(e)(2), such that its interim status terminated on November 8, 1985. We do not want, or need, to prejudge that question. Rather, to determine whether this case is moot, we will simply ask whether, assuming *arguendo* that CORCO's interim status did terminate on November 8, 1985, there remain viable claims for relief. Finding that viable claims remain even if the interim status has terminated, we conclude that we have subject-matter jurisdiction over this case.

Even if CORCO lost its interim status by operation of law on November 8, 1985, a court could, at the very least, stay the

EPA's ongoing enforcement action which seeks to require CORCO to comply with its closure and post-closure obligations. *See* 40 C.F.R. Part 265. Under the RCRA regulations, a facility must, within fifteen days, submit a closure plan for hazardous waste management units no longer operating under interim status, 40 C.F.R. § 265.112, and must complete closure within 180 days of the final receipt of hazardous wastes or the approval of the closure plan. 40 C.F.R. § 265.113.

While CORCO apparently sought a stay for the purpose of preserving its interim status — a status that may now have terminated by operation of 42 U.S.C. § 6925(e)(2) — its motion for stay is much broader. CORCO sought an order "staying *any* enforcement or revocation proceeding" and requested that the bankruptcy court enter an order "staying enforcement proceeding [sic] against CORCO by the EPA under the Resource Conservation and Recovery Act." (emphasis added). In light of the broad nature of CORCO's motion and the ongoing EPA enforcement action against CORCO, a real controversy between the parties remains. Consequently, this case is not moot. It is clear that there remain live issues between the parties in this case. The fact that a stay of these proceedings might not have the potential for preserving CORCO's interim status does not end the controversy or deprive the parties of their legally cognizable interests in the dispute. Therefore, we now address the substantive issues presented in this case.

III.

Appellants contend that the district court erred in affirming the bankruptcy court's holding that the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. § 362(a)(1), did not apply to the EPA's actions in this case. Appellants do not appear to dispute that the EPA's administrative action is directed at bringing CORCO into compliance with state and

federal environmental laws. Rather, they contend that the EPA's action is merely one to correct "technical violations" and that a present ongoing threat of "imminent and identifiable harm" to safety and health or "urgent public necessity" is required before the governmental regulation exception to the automatic stay may be invoked. In support of the argument that the exception is limited to those situations where there is imminent and identifiable harm, CORCO cites *Midlantic Nat. Bank v. New Jersey Dept. of Envtl. Protection,* 106 S.Ct. 755 (1986). In *Midlantic,* the Supreme Court held that there was a limited exception to the trustee's abandonment power created under 11 U.S.C. § 554(a) for those cases where abandonment would thwart "laws or regulations . . . reasonably calculated to protect the public health or safety from imminent and identifiable harm." 106 S.Ct. at 762-63 n.9. Additionally, to bolster its argument, CORCO cites portions of the legislative history of the government regulation exception. CORCO contends that no pollution is taking place because the refinery is shut down, and thus, that no imminent and identifiable harm exists. Further, appellants argue that since CORCO would be forced to expend funds in order to comply, the EPA's administrative action is one to enforce a money judgment and is therefore stayed by virtue of 11 U.S.C. §§ 362(a)(2) and 362(b)(5).[5]

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[5] In addition to arguing that there is no urgency here, the creditor's committee focuses on the amount of money that CORCO is going to have to spend to comply with RCRA and says that the EPA's enforcement action and resulting debts of CORCO should also be dischargeable. Alternatively, the creditor's committee argues that the interim status permit is property protected under the automatic stay, a valuable asset which should be protected, relying on *In re Professional Sales Corp.,* 48 B.R. 651 (Bankr. N.D. Il1.), *vacated,* 56 B.R. 753 (N.D. Il1. 1985), where the bankruptcy court issued an injunction under § 105(a) to prevent the EPA from taking away the debtor's interim status permit.

A.

The automatic stay provision of the Bankruptcy Code provides, in relevant part, that the filing of a petition in bankruptcy operates as a stay of "the commencement or continuation . . . of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before commencement of the case under this title." 11 U.S.C. § 362(a)(1). The purpose of the automatic stay is to give the debtor a "breathing spell" from his creditors, and also, to protect creditors by preventing a race for the debtor's assets. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6296-97 [hereinafter cited as *House Report*]. The automatic stay provision is now, however, absolute. Congress set forth, in 11 U.S.C. § 362(b), several exceptions to the automatic stay. Relevant to this case are 11 U.S.C. §§ 362(b)(4) and 362(b)(5).

Section 362(b)(4) provides that the filing of a petition in bankruptcy does not operate as a stay "of the commencement or continuation of an action or proceeding by a governmental unit to enforce [its] police or regulatory power." The purpose of this exception to the automatic stay is explained in the legislative history:

> Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.

S. Rep. No. 989, 95th Cong., 2d Sess. 52 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5838 [hereinafter cited as *Senate Report*]; *House Report, supra,* at 343.

Section 362(b)(5) provides that the filing of a bankruptcy petition does not operate as a stay "of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." While expressly excepting from the automatic stay certain judgments obtained in actions to enforce police or regulatory powers, § 362(b)(5) creates an " 'exception to the exception,' [from the automatic stay] in that actions to enforce money judgments *are* affected by the automatic stay, even if they otherwise were in furtherance" of police and regulatory powers. *Penn Terra Ltd. v. Dept. of Envtl. Resources,* 733 F.2d 267, 272 (3d Cir. 1984) (emphasis in original). As the legislative history explains:

> Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.

Senate Report, supra, at 52; *House Report, supra,* at 343.

The bankruptcy court found that § 362(a)(1) was inapplicable to the EPA's impending enforcement action against CORCO. The court reasoned that the intent underlying both §§ 362(b)(4) and 362(b)(5) is to permit a governmental unit that is suing a debtor to prevent or stop a violation of environmental protection laws to continue, and that the action which

the EPA was seeking to institute was clearly an action that Congress intended to exempt from the automatic stay:

> The action which EPA is seeking to institute is precisely the type of proceeding Congress intended to exempt from the stay. The RCRA requirements are designed to protect the environment. Congress expressly stated in RCRA that "[t]he objectives of this chapter are to promote the protection of health and environment and to conserve valuable material and energy resources by . . . (4) regulating the treatment, storage,transportation, and disposal of hazardous wastes which have adverse effects on health and the environment . . . . " Section 1003, 42 U.S.C. § 6902.

58 B.R. at 612. Further, the court found that, notwithstanding the fact that CORCO would be forced to expend funds to comply, the EPA's actions were exempt from the automatic stay. *Id.* at 613-15.

The district court, affirming the bankruptcy court's decision, found that "[t]he attempt to require debtor to comply with the permit requirements or lose interim status is a legitimate exercise of the government's regulatory power," *Slip op.* at 2, and went on to say that "[t]he incidental expense which debtor will incur to comply with environmental laws does not convert the action into an enforcement of a money judgment, which would be automatically stayed." *Id.* at 3.

We agree with the conclusion of the bankruptcy court and the district court that the automatic stay does not apply to the EPA's actions in this case. The EPA has the authority to enforce its regulatory power, that is, to require CORCO to comply with the federal and state environmental laws and regulations at issue in this case. The enforcement actions of the EPA in this case do not come within the ambit of § 362(a)(1) because they are actions to enforce police and regulatory powers, thus falling within the § 362(b)(4) exception to the

automatic stay. The EPA's actions are not an attempt to enforce a money judgment, proscribed by § 362(b)(5), notwithstanding the fact that CORCO will be forced to expend funds in order to comply.

B.

The exception from the automatic stay for proceedings to enforce police and regulatory powers is not, as appellants suggest, limited to those situations where "imminent and identifiable harm" to the public health and safety or "urgent public necessity" is shown. The words of §§ 362(b)(4) and 362(b)(5) allow for no such reading. The language of these exceptions is unambiguous — it does not limit the exercise of police or regulatory powers to instances where there can be shown imminent and identifiable harm or urgent public necessity. Where the language of a statute is unambiguous, in the absence of " 'clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.' " *North Dakota v. United States*, 460 U.S. 300, 312 (1983) (quoting *Consumer Product Safety Comm. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). In this case, the legislative history of the statutory provisions does not call into question our reading of §§ 362(b)(4) and 362(b)(5) as exempting from the automatic stay, without a showing of imminent harm or urgent public necessity,[6] exercises of police and regulatory powers.[7]

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[6] Without expressing a view as to what constitutes imminent harm and urgent public necessity or as to whether imminent and identifiable harm or urgent public necessity can be said to exist in this case, we simply note that the EPA's permitting procedure and attendant information-gathering system are vital components of the environmental protection system. *See infra* note 11.

[7] We find nothing in the legislative history of § 362(b)(4) that persuades us that the police and regulatory power exception to the

Case law supports our conclusion that the police and regulatory exceptions do not depend on a showing of imminent and identifiable harm or urgent public necessity and that the EPA's actions in this case are exempt from the automatic stay.

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automatic stay can only be invoked where there is a showing of imminent and identifiable harm or urgent public necessity. Appellants point generally to floor statements regarding § 362(b)(4) in which it was noted that the § 362(b)(4) exception "is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate." 124 Cong. Rec. H11089, *reprinted in* 1978 U.S. Code Cong. & Admin. News 6436, 6444-45 (statement of Rep. Edwards); 124 Cong. Rec. S17406, *reprinted in* 1978 U.S. Code Cong. & Admin. News 6506, 6513 (statement of Sen. DeConcini). We cannot read these statements to exempt from the exception police and regulatory actions designed to protect the public health and safety. We find no basis for reading the admonition that the exception be contrued narrowly to exclude anything but those actions which are, in fact, aimed at protecting the goverment's monetary interest.

Additionally, appellants cite a portion of the House Report in support of their argument:

> Under present [pre-Code] law there has been some overuse of the stay in the area of governmental regulation. For example, in one Texas bankruptcy court, the stay was applied to prevent the State of Maine from closing down one of the debtor's plants *that was polluting* a Maine River in violation of Maine's environmental protection laws .... The bill [the 1978 Code] excepts these kinds of actions from the automatic stay.

House Report, supra, at 174-75 (citations omitted) (emphasis added). This passage, with the emphasis added by appellants, is said to evince a congressional intent to limit § 362(b)(4) to cases where the government can show present ongoing pollution posing an imminent threat. We cannot accept this as evidence of such a congressional intent.

For example, in *Penn Terra*, the Third Circuit found that the exception to the automatic stay in §§ 362(b)(4) and 362(b)(5) should be construed broadly so as not to override state laws enacted to protect some public interest.[8] 733 F.2d at 273. The *Penn Terra* court found that the state's action to compel Penn Terra to correct violations of anti-pollution laws was exempt from the automatic stay. These violations consisted, in part, of a failure to maintain adequate erosion and sedimentation controls, failure to seal a deep mine pit, and failure to treat mine drainage properly. *See* 733 F.2d at 269 n.2.

The Supreme Court, in *Ohio v. Kovacs*, 469 U.S. 274 (1985), noted the *Penn Terra* decision in the context of recognizing that "[t]he automatic stay provision does not apply to suits to enforce the regulatory statutes of the State." 469 U.S. at 283-84 n.11. The Court accepted the result of *Penn Terra* in cases where the governmental action is one to enforce regulatory statutes, as opposed to one to enforce a money judgment. *Id.* Neither *Penn Terra* nor the other cases in which a regulatory or police action was found to be exempt from the automatic stay depended on a determination that there was imminent danger to the public.[9] Contrary to what appellants

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[8] The court also noted that the "exception to the exception" created by § 362(b)(5), making enforcement of money judgments by governmental units subject to the automatic stay, "should be contrued *narrowly* so as to leave to the States as much of their police power as a fair reading of the statute allows." 733 F.2d at 273 (emphasis in original).

[9] Adding further support to our conclusion that the EPA's regulatory action is exempt from the automatic stay are cases wherein courts faced with non-environmental exercises of police or regulatory powers have interpreted § 362(b)(4). *See, e.g., EEOC v. Rath Packing Co.*, 787 F.2d 318 (8th Cir.), *cert. denied*, 55 U.S.L.W. 3258 (1986) (automatic stay did not apply to Title VII action); *Cournoyer v. Town of Lincoln*, 790 F.2d 971 (1st Cir. 1986) (Town's

suggest, the fact that "imminent and identifiable harm" can be shown in cases where the regulatory exception was found to apply does not form the basis for reading such a requirement into the exceptions.

Appellants' reliance on the Supreme Court's recent decision in *Midlantic* is misplaced. *Midlantic* presented the question of "whether § 554(a) of the Bankruptcy Code 11 U.S.C. § 554(a), authorizes a trustee in bankruptcy to abandon property in contravention of state laws or regulations that are reasonably designed to protect the public's health or safety." 106 S.Ct. at 757 (citation omitted). In *Midlantic*, the Court recognized an exception to the power of a trustee to abandon property, but limited that exception to those instances in which abandonment would violate laws or regulations "reasonably calculated to protect the public health or safety from imminent and identifiable harm." *Id.* at 762-63 n.9.

In concluding that *Midlantic* does not support appellants' argument that the §§ 362(b)(4) and 362(b)(5) exceptions to the automatic stay cannot be invoked absent imminent and identifiable harm, we note several things. First, the question before the Court in *Midlantic* was the scope of the abandon-

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action to clear debtor's property of scrap metal and automotive parts exempt from automatic stay); *Ahrens Aircraft, Inc. v. NLRB*, 703 F.2d 23 (1st Cir. 1983) (enforcement of an NLRB order awarding back pay was not subject to automatic stay by virtue of 11 U.S.C. §§ 362(b)(4) and (5)); *NLRB v. Evans Plumbing Co.*, 639 F.2d 231 (5th Cir. 1981) (NLRB proceeding for entry of judgment for back pay is exempt from automatic stay); *In re D.H. Overmyer Telecasting Co.*, 35 B.R. 400 (Bankr. N.D. Ohio 1983) (action by the Federal Communication Commission to strip debtor of its broadcasting license is exempt regulatory action); *Donovan v. TMC Industries, Ltd.*, 20 B.R. 997 (N.D. Ga. 1982) (action to enjoin sale of goods produced in violation of Fair Labor Standards Act is excepted regulatory action).

ment power, and it is *that* power that the Court found to be limited by the "imminent and identifiable harm" standard. Second, notwithstanding the fact that the Court found that pre-Code case law had established limitations on the trustee's abandonment power, *see* 106 S.Ct. at 759-60, it must be recognized that the abandonment power of § 554 is unqualified on its face.[10] By contrast, the automatic stay was expressly qualified by Congress — 11 U.S.C. § 362(b)(4) specifically excludes the exercise of regulatory and police powers from the automatic stay, Moreover, the Supreme Court itself characterized the automatic stay provision as designed to overrule judicial expansion of the automatic stay that was "foreclos[ing] States' efforts to enforce their antipollution laws." 106 S.Ct. at 761. Nowhere did the Supreme Court suggest that the exception in 11 U.S.C § 362(b)(4) applies only if there is imminent and identifiable harm to the public health or safety.

The EPA's enforcement action in this case is an attempt to bring CORCO into compliance with state and federal environmental laws and "falls squarely within the [government's] police and regulatory powers. . . . No more obvious exercise of the [government's] power to protect the health, safety, and welfare of the public can be imagined." *Penn Terra,* 733 F.2d at 274. As such, we find that it falls squarely within the § 362(b)(4) police and regulatory exception to the automatic stay.[11]

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[10] Section 554(a) provides: "After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." 11 U.S.C. § 554(a).

[11] We note that appellants' characterization of the proceedings at issue here as attempts to correct mere "technical violations," and therefore, somehow less worthy of exception from the automatic stay, is misguided. First, the exceptions to the automatic stay make

We must reject appellants' argument that the EPA's enforcement action in this case is an attempt to enforce a money judgment, thus proscribed under § 362(b)(5), since either the filing of a Part B application or the filing of a closure plan and commencement of closure activities would require CORCO to expend funds. This cannot be the test for determining whether a governmental unit seeks to enforce a money judgment, such that its enforcement actions fall within the § 362(b)(5) "exception to the exception" to the automatic stay. As the Third Circuit has observed, "[w]ere we to find that any order which requires the expenditure of money is a 'money judgment,' then the exception to section 362 for government police action ... would ... be narrowed into virtual nonexistence .... [W]e cannot ignore the fundamental fact that, in contemporary times, almost everything costs something." *Penn Terra*, 733 F.2d at 277-78.

Congress did not define the phrase "enforcement of a money judgment" in § 362(b)(5), so, as the court in *Penn Terra* noted, "[i]ts meaning must ... be gleaned from the commonly accepted usage and from whatever indications of congressional intent we find persuasive .... [W]e must look to legal custom and practice to determine what was *traditionally* understood to be a recovery for money damages." *Penn Terra*, 733 F.2d at 274-75 (emphasis in original). As traditionally understood, a money judgment "need consist of only two elements: (1) an identification of the parties for and against whom judgment is being entered, and (2) a *definite* and *certain* designation of the amount which plaintiff is owed by defendant. It need not, and

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no such distinction. Second, the EPA, to protect the public health and safety, must gather information from facilities like CORCO and maintain permitting procedures. Without such information gathering and permitting systems, the EPA would be impeded in its obligation to administer the environmental protection system.

generally does not, contain provisions for its enforcement."[12] *Id.* at 275 (emphasis in original).

Just as the Third Circuit found in *Penn Terra* with respect to proceedings initiated by Pennsylvania's Department of Environmental Resources, we find that, at least as a matter of form, the EPA's action is not a proceeding to enforce a money judgment as that term is traditionally understood. Furthermore, the EPA's action which is clearly not, in form, an action to enforce a money judgment, is also not, in substance, an action to enforce a money judgment. Since we agree with the Third Circuit that the legislative intent underlying § 362(b)(5) should not be undermined "by artful pleading that depends on form rather than substance," 733 F.2d at 275, we must look beyond form to substance to determine whether the EPA's action in reality sought to achieve what a money judgment was traditionally meant to achieve and no more.

The *Penn Terra* court explicitly rejected the notion that simply because an injunction action will require the debtor to

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[12] The Third Circuit noted that:

> As the legislative history explicity notes, the mere *entry* of a money judgment by a governmental unit is not affected by the automatic stay, provided of course that such proceedings are related to that government's police or regulatory powers.
>
> Quite separate from the entry of a money judgment, however, is a proceeding to *enforce* that money judgment. The paradigm for such a proceeding is when, having obtained a judgment for a sum certain, a plaintiff attempts to seize property of the defendant in order to satisfy that judgment. It is this seizure of a defendant-debtor's property, to satisfy the judgment obtained by a plaintiff-creditor, which is proscribed by subsection 362(b)(5).

Penn Terra, 733 F.2d at 275 (citations omitted) (emphasis in original).

expend funds, that action is, in actuality, one to enforce a money judgment.[13] 733 F.2d at 277-78. In rejecting that notion, the court recognized that "in contemporary times, almost everything costs something," *id.* at 278, and commented that "[a]n injunction which does not compel some expenditure or loss of monies may often be an effective nullity."[14] *Id.* (cita-

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[13] The recent decision in *United States v. ILCO, Inc.*, 48 B.R. 1016 (N.D. Ala. 1985), also rejected the notion that the expenditure of funds will suffice to convert a proceeding into an action to enforce a money judgment, and explained:

> ILCO, as well as other defendants, will be forced to spend money to clean up the hazardous waste sites. Obviously, this will deplete ILCO's assets to the detriment of other creditors. Congress indicated in § 362(b), however, that preserving the debtor's estate was not always the dominant goal. The legislative history . . . indicates that the enforcement of an injunction ordering compliance with environmental laws is more important than the debtor's right to have a breathing spell from its creditors or than the creditors' rights to an orderly administration of the estate. Furthermore, if courts were to find, as ILCO contends, that an order which requires the expenditure of money is a "money judgment," then "the exception to section 362 for government police [and regulatory] action, which should be construed broadly, would instead be narrowed into virtual non-existence . . . . [A]lmost everything costs something. An injunction which does not compel some expenditure or loss of monies may often be an effective nullity."

48 B.R. at 1023 (citing *Penn Terra*, 733 F.2d at 277-78). *But see United States v. Johns-Manville Sales Corp.*, 13 Envtl. L. Rep. 20310, 20311-12 (1982).

[14] We note that in *Ohio v. Kovacs*, 469 U.S. 274 (1985), the Supreme Court stated that the automatic stay provision did not apply to suits to enforce the regulatory statutes of a state. 469 U.S. at 283-84 n.11. The Court noted that in *Penn Terra* the state's effort was held to be directed at enforcing an injunction to require compliance with an environmental law, not to enforce a money

tions omitted). The Third Circuit proposed that a better approach for a court to take to determine whether an injunction action is, in application, a money judgment suit, is to focus "on the nature of the injuries which the challenged remedy is intended to redress — including whether plaintiff seeks compensation for past damages or prevention of future harm." *Id.; see Cournoyer v. Town of Lincoln,* 790 F.2d 971, 976 (1st Cir. 1986); *ILCO,* 48 B.R. at 1024.

Utilizing this approach, we conclude that the EPA's administrative action is not, in form or in substance, an action to enforce a money judgment proscribed by § 362(b)(5). The action is one to compel compliance with federal and state environmental laws. The action does not seek the entry of a

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judgment. In *Kovacs* the court noted that in the specific circumstances before it, the clean up duty had been reduced to a monetary obligation and that "[o]n the facts before it, and with the receiver in control of the site, we cannot fault the Court of Appeals for concluding that the cleanup order had been converted into an obligation to pay money, an obligation that was dischargeable in bankruptcy." *Id.* at 283. The Court noted that Ohio, instead of prosecuting Kovacs under the environmental laws — as the EPA intends to do in this case — secured the appointment of a receiver who was ordered to take possession of Kovacs' nonexempt assets as well as the assets of the corporate defendants and to comply with the injunction entered against Kovacs. It dispossessed Kovacs. What the receiver wanted from Kovacs after the bankruptcy was the money to defray the clean up costs. At oral argument before the Supreme Court, the state's counsel conceded that after the receiver was appointed, the only performance sought from Kovacs was the payment of money.

We believe that *Kovacs* can properly be read as an acceptance of *Penn Terra's* money judgment analysis, and, at the very least, should be seen as casting no doubt on *Penn Terra.* The Supreme Court in *Kovacs* made it clear that it was the dispossession of Kovacs' assets and the appointment of a receiver that turned the injunction in that case into, a dischargeable monetary obligation

money judgment or the adjudication of liability for a sum certain. Further, mere payment of money, even if it could be estimated, would not satisfy the EPA's requests.[15] Finally, the EPA's action cannot be seen as an attempt to obtain compensation for past damage. Therefore, the EPA's enforcement action requiring CORCO to comply with federal and state environmental laws is a proper exercise of its regulatory power and is not an attempt to enforce a money judgment. It is exempt from the automatic stay by virtue of §§ 362(b)(4) and 362(b)(5).

IV.

We turn now to the question of whether, under the facts of this case, the bankruptcy court abused its discretion in refusing to issue a stay of EPA proceedings under 11 U.S.C. § 105. Section 105(a) provides, in relevant part, that "[t]he bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Assuming that a § 105 stay is available to stay an action expressly exempted by Congress from the operation of the automatic stay provision,[16] we find

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[15] The EPA in the instant case made it clear to the bankruptcy court that it in no way intends to bring CORCO into compliance with the applicable environmental laws and regulations by dispossessing CORCO of its assets or by seeking complaince by a money judgment. Rather, the EPA is seeking to bring CORCO into compliance with the federal environmental laws and the hazardous waste regulations of Puerto Rico.

[16] The legislative history of the Bankruptcy Code explains that:

> Subsection (b) lists five exceptions to the automatic stay. The effect of an exception is not to make the action immune from injunction.
>
> The court has ample other powers to stay actions not covered by the automatic stay. Section 105, of proposed ti-

that the bankruptcy court did not abuse its discretion in refusing to issue a stay under § 105 in this case.

> tle 11, derived from Bankruptcy Act § 2a(15), grants the power to issue orders neecssary [sic] or appropriate to carry out the provisions of title 11. The bankruptcy courts are brought within the scope of the All Writs Statute, 28 U.S.C. 1651 (1970), and are given the powers of a court of law, equity, and admiralty (H.R. 8200, § 243(a), proposed 28 U.S.C. 1481). Stays or injuctions issued under these other sections will not be automatic upon the commencement of the case, but will be granted or issued under the usual rules for the issuance of injunctions. By excepting an act or action from the automatic stay, the bill simply requires that the trustee move the court into action, rather than requiring the stayed party to request relief from the stay. There are some actions, enumerated in the exceptions, that generally should not be stayed automatically upon the commencement of the case, for reasons of either policy or practicality. Thus, the court will have to determine on a case-by-case basis whether a particular action which may be harming the estate should be stayed.

House Report, supra, at 342; *Senate Report, supra,* at 51.

Courts considering the scope of § 105 have seen it as an avenue available for staying actions that are found to fall within an exception to the automatic stay. *See Browning v. Navarro,* 743 F.2d 1069, 1084 (5th Cir. 1984); *State of Missouri v. United States Bankruptcy Court,* 647 F.2d 768, 776-77 (8th Cir. 1981), *cert. denied,* 454 U.S. 1162 (1982); *In re Bel Air Chateau Hosp., Inc.,* 611 F.2d 1248, 1251 (9th Cir. 1979); *Penn Terra,* 733 F.2d at 273; *In re Global Int'l. Airways Corp.,* 48 B.R. 849, 851 (W.D. Mo. 1985); *In re Professional Sales Corp.,* 48 B.R. at 660; *In re Jerzak,* 47 B.R. 771, 773 (Bankr. W.D. Wisc. 1985); *In re Farmers & Ranchers Livestock Auction, Inc.,* 46 B.R. 781, 796 (Bankr. E.D. Ark. 1984); *In re King Memorial Hosp., Inc.,* 4 B.R. 704, 709 (Bankr. S.D. Fla. 1980); *cf. NLRB v. Superior Forwarding, Inc.,* 762 F.2d 695, 699 (8th Cir. 1985).

We note however, that the powers of a court under § 105 are not unlimited. *See, e.g., United States v. Sutton,* 786 F.2d 1305, 1307-08

The bankruptcy court noted that the legislative history of § 105 makes clear that stays under that section are granted only "under the usual rules for the issuance of an injunction." *Senate Report, supra,* at 51; *House Report, supra,* at 342; *see In re Cournoyer,* 43 B.R. 354 (Bankr. D.R.I. 1984), *aff'd in part, rev'd in part,* 53 B.R. 478 (D.R.I. 1985), *aff'd,* 790 F.2d 971 (1st Cir. 1986). The four prerequisites to the issuance of a preliminary injunction are: (1) a substantial likelihood that the movant will prevail on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to the movant outweighs the threatened harm an injunction may cause the party opposing the injunction; and (4) that the granting of the injunction will not disserve the public interest. *See Southern Monorail Co. v. Robbins & Myers, Inc.,* 666 F.2d 185, 186 (5th Cir. 1982).

The bankruptcy court found that CORCO had conceded the first requirement, stating that, "[s]pecifically, the debtor-in-possession has noted that 'CORCO does not assert that the EPA is wrong, or that it is acting in an arbitrary and capricious manner with respect to the substantive environmental issues. . . .'" 68 B.R. at 615-16. The bankruptcy court also noted the testimony of CORCO's vice-president who had ac-

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(5th Cir. 1986); *Southern Ry. Co. v. Johnson Bronze Co.,* 758 F.2d 137, 141 (3d Cir. 1985); *In re Fox,* 725 F.2d 661, 663 (11th Cir. 1984); *Johnson v. Nat. Bank of Montevideo,* 719 F.2d 270, 273 (8th Cir. 1983), *cert. denied,* 465 U.S. 1012 (1984); *In re Pirsig Farms, Inc.,* 46 B.R. 237, 240 (D. Minn. 1985); *In re Wood,* 33 B.R. 320, 322-23 (Bankr. D. Idaho 1983); *In re Candor Diamond Corp.,* 26 B.R. 850, 851 (Bankr. S.D.N.Y. 1983); *In re Dunkle Assocs., Inc.,* 19 B.R. 481, 485-86 (Bankr. E.D. Pa. 1982). While the question of where the outermost boundaries of a court's powers under § 105 fall is an interesting one and one worthy of consideration, that question is not presently before this court and we do not attempt to resolve that question here.

knowledged "that CORCO has filed neither a Part B nor a closure plan and that the facility has not complied with the requirements of the interim status regulations, such as ground water monitoring." *Id.* at 616. Therefore, the bankruptcy court concluded that it was unnecessary to address the other three prerequisites for the issuance of a preliminary injunction.

The district court agreed with the bankruptcy court's conclusions that CORCO had failed to establish the prerequisites for a § 105 stay, since "[t]hey concede they cannot prevail on the merits by their admissions that no Plan B has been filed and no groundwater monitoring system exists."[17] *Slip op.* at 3.

Appellants argue that both the bankruptcy court and the district court misapprehended what the "merits" would be for purposes of assessing whether there was a substantial likelihood that CORCO would prevail on the merits. According to appellants, the courts below erroneously viewed the merits to be whether CORCO had complied with the EPA, that is, whether CORCO would be likely to succeed in the underlying enforcement action.[18] In appellants' view, the merits are, instead, whether CORCO must *now* comply with the federal and

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[17] With respect to the likelihood of success on the merits, the district court went on to note that the loss of interim status on November 8, 1985, also precludes success on the merits. Additionally, the Court noted that an injunction would disserve the public interest since it would delay a determination about possible groundwater contamination.

[18] Appellants are urging that the bankruptcy court and the district court focused on the wrong issue —the issue is not whether CORCO will prevail on the merits, but simply, whether a proceeding must be stayed so that reorganization efforts mandated by the Bankruptcy Code will not be thwarted by the proceeding. They urge what can best be described as a "balancing of the equities" approach.

state environmental laws, or whether it can later comply as part of a reorganization plan.

We believe that the bankruptcy and district courts correctly identified the "merits" for purposes of assessing the propriety of the issuance of a § 105 stay. *See In re Cournoyer,* 43 B.R. at 360. The inquiry for a preliminary injunction necessarily focuses on the outcome of a later proceeding, at which time the merits of the questions giving rise to the litigation will be decided. CORCO's characterization of the "merits" for purposes of the preliminary injunction analysis erroneously substitutes the question before the court at the preliminary injunction hearing for the merits of the case that must be ultimately decided.

Since we believe that the bankruptcy court and the district court correctly identified the "merits," and because we believe that the finding that CORCO was not likely to succeed on the merits was not erroneous,[19] we need not address the remaining requirements for a § 105 stay.[20] We briefly note, however, that a

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[19] CORCO disputes the conclusion that it "conceded" that the EPA would prevail in an enforcement action against it. Even if we were to accept CORCO's argument, we would still find that the district court did not abuse its discretion because there is sufficient support for the conclusion that there is not a substantial likelihood that CORCO would prevail.

[20] Additionally, we need not delay long in disposing of a final argument raised in this case. At this late stage in these proceedings, and at the veritable tail-end of its brief, the creditor's committee argues that the district court erred in failing to hold a "*de novo* hearing." We note that CORCO does not raise this argument at all. We find this argument to be disingenuous, at best, given the fact that the creditor's committee, as well as the Indenture Trustee and CORCO, took an appeal from "the final order of the Bankruptcy Court" to the district court. *See* Notice of Appeal of the Official Committee of Unsecured Creditors (May 24, 1985).

balancing of the harms in this case seem to weigh in favor of the EPA. Enforcement of the environmental laws is in the public interest. While we do not decide today that there will never be a case where a court should issue a § 105 stay to stop proceedings that are exempted from the automatic stay under §§ 362(b)(4) or 362(b)(5), we do believe that this clearly is not such a case. After two petitions for bankruptcy protection, numerous extensions of the exclusivity period in the current reorganization, and no reorganization plan yet filed, CORCO is in no position to argue that it is "equitably" entitled to more time to comply with the EPA's requirements. the time has come for CORCO to comply.

V.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

III

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

(Garcia, J.)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

IN THE MATTER OF: COMMONWEALTH OIL REFINING COMPANY, INC., *Debtor* OFFICIAL COMMITTEE OF UNSECURED CREDITORS AND THE INDENTURE TRUSTEE, *Appellants* *vs.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Appellee*	SA-85-CA-2045

MEMORANDUM OPINION

On appeal is the Order of United States Bankruptcy Judge Joseph C. Elliott denying debtor's motion to determine the applicability of the automatic stay provision, Title 11 U.S.C. Section 362, to an action by the United States Environmental Protection Agency (EPA) to enforce the Resource Conservation and Recovery Act (RCRA), Title 42 U.S.C. Sections 6901-6987. Judge Elliott held that the EPA's action was an exercise of its regulatory power and, thus, excepted from an automatic stay. Title 11 U.S.C. Section 362(b)(4). He also denied debtor's request for a stay pursuant to Title 11 U.S.C. Section 105. The debtor, the indenture trustee and the creditor's committee have timely appealed from the Order. This Court has examined the transcript of the hearing in bankruptcy court, the exhibits, the pleadings and the applicable law, and is of the opinion the Order should be affirmed.

It occurs to the Court that the entire appeal may be moot. The only issue is whether the EPA can force the debtor to file a Plan B or lose interim status and file a closure plan on its hazardous waste facility in Puerto Rico. Section 6925(e)(2) of Title 42 of the United States Code provides that the interim status of a land disposal facility shall terminate automatically on November 8, 1985 unless the owner or operator applies for a final determination regarding the issuance of a permit and certifies that such facility is in compliance with all applicable groundwater monitoring requirements. Since debtor did place hazardous waste in a surface impoundment (Tr. 23,50,52), its plant in Puerto Rico is a land disposal facility. Title 11 U.S.C. Section 6924(k). Debtor has conceded it has not filed its Plan B and has not instituted a groundwater monitoring system. (Tr. 30). It appears that regardless of the outcome of this appeal, debtor will, by Congressional mandate, lose its interim status on November 8th unless it complies with the above conditions, which it most likely will not or cannot do.

In any event, this Court finds, for the reasons set forth in Judge Elliott's opinion, that EPA's enforcement action should not be restrained. The attempt to require debtor to comply with the permit requirements or lose interim status is a legitimate exercise of the government's regulatory power. *In re Cournoyer,* 43 B.R. 354 (Bkrtcy. 1984) (and cases cited therein). Assuming that an ongoing threat must be shown to avoid the automatic stay, testimony at the hearing established that debtor's previous handling of hazardous waste might have caused groundwater contamination, which cannot be determined without a monitoring system required by federal and Puerto Rico law. This is not a situation in which the debtor is being forced to clean up past damage. The EPA has no monetary interest in compliance. The incidental expense which debtor will incur to comply with environmental laws does not convert the action into an enforcement of a money judgment,

which would be automatically stayed. Title 11 U.S.C. Section 362(b)(5).

Appellants have failed to establish the prerequisites necessary for a stay under Title 11 U.S.C. Section 105(a). They concede they cannot prevail on the merits by their admissions that no Plan B has been filed and no groundwater monitoring system exists. The automatic loss of interim status on November 8th also precludes success on the merits. Additionally, an injunction restraining enforcement of the environmental laws would disserve the public interest since it would delay a determination as to groundwater contamination.

The argument that Puerto Rican law preempts EPA enforcement is without merit. Whether or not Puerto Rico chooses to enforce its environmental laws, the federal government is authorized to revoke the hazardous waste permit of a noncomplying facility, Title 11 U.S.C. Section 6925(d), and otherwise require compliance by a person in violation of the RCRA. Title 11 U.S.C. Section 6928(a)(1) and (a)(2). Since the government denies reliance on Title 28 U.S.C. Section 959(b) as authority for enforcement, and the Court believes such additional authority is unnecessary, appellants' argument that section 959(b) is inapplicable will not be considered.

Appellants are not entitled to a stay of EPA enforcement. At the hearing, debtor's representative testified it would be eighteen months before debtor would even know what it intended to do with the facility. Appellants want this Court to suspend the applicability of environmental law requirements to give debtor this time. They contend that an expenditure of money to comply will damage reorganization efforts. Even if true, this will not preclude the EPA from terminating debtor's interim status. *See, In re Fresh Approach, Inc.*, 49 B.R. (Bkrtcy. 1985). The bankruptcy court correctly ruled that enforcement can proceed.

SIGNED this 5th day of November, 1985.

H. F. Garcia
United States District Judge

IV

MEMORANDUM OPINION FOR THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

(Elliott, J.)

UNITED STATES BANKRUPTCY COURT FOR
THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

IN RE: COMMONWEALTH OIL REFINING COMPANY, INC., *Debtor.*	No. 5-84 01153E (Chapter 11)

MEMORANDUM AND ORDER

Pending before the Court is debtor's motion for an order determining the applicability of the Bankruptcy Code's automatic stay provision, 11 U.S.C. § 362(a)(1), to an impending enforcement action by the United States Environmental Protection Agency ("EPA") under section 3008 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6987 (1982). In the alternative, CORCO has moved for an order staying EPA's enforcement action pursuant to 11 U.S.C. § 105. EPA opposes the motion.

After considering the parties' pleadings, affidavits, oral arguments of counsel, and the additional evidence presented at the hearing of April 3, 1985, the Court makes the following findings of fact and conclusions of law:

I. Federal Statutory and Regulatory Framework.

Section 3005 of RCRA, 42 U.S.C. § 6925, requires that facilities which treat, store, or dispose of hazardous waste obtain a permit from EPA or from an authorized State.[1] Such permits are to be issued by EPA only upon a determination

[1] Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), allows the Administrator of EPA to authorize a State (including the Commonwealth of Puerto Rico) to operate its own hazardous waste program in lieu of the federal program, providing the State makes certain showings.

that the facility is in compliance with the section 3004 hazardous waste management standards (promulgated by EPA in 40 C.F.R. Part 264) and the section 3005 hazardous waste permit requirements (promulgated by EPA in 40 C.F.R. Part 270). 42 U.S.C. §§ 6924, 6925. Congress recognized, however, that EPA would not be able to issue permits to all hazardous waste management ("HWM") facilities before the permit program became effective. Therefore, section 3005(e), 42 U.S.C. § 6925(e), provides that certain facilities would be treated as having been issued a permit until final administrative action was taken on their permit application. *See generally Hempstead County & Nevada County Project v. EPA,* 700 F.2d 459, 460-62 (8th Cir. 1983). A facility obtains this "interim status" if it meets the following three statutory requirements, set out in section 3005(e), 42 U.S.C. § 6925(e): First, that the facility was in existence on November 19, 1980 or is in existence on the effective date of statutory or regulatory changes under RCRA that require the facility to have a permit; second, that the facility complied with the requirements of section 3010(a), 42 U.S.C. § 6930(a), which requires notification of hazardous waste activity; and, third, that the facility filed a permit application which conforms with EPA regulations. Any facility which does not meet these requirements does not have interim status and, if operated without a permit, is in violation of RCRA.

EPA has promulgated regulations setting out the requirements for the permit application which must be filed as a prerequisite to interim status. *See* 40 C.F.R. §§ 270.2, 270.10, 270.70-270.73 (1984). The regulations require that an existing facility first submit Part A of its permit application. *Id.* §§ 270.1, and 270.10(e). The Part A application requires minimal descriptive information such as the location of the facility and processes used in the treatment, storage and disposal of hazardous waste. *Id.* § 270.13. A facility which has interim

status can continue to operate without a RCRA permit until EPA acts on the facility's permit application. *Id.* § 270.1(b). The interim status facility must, however, comply with federal regulations and applicable state requirements. 42 U.S.C. § 6929; 40 C.F.R. Part 265, § 270.1(b) (1984).

For these interim status facilities, the actual section 3005(c) permitting process begins with EPA's request for the second part of the permit application, known as Part B. *Id.* §§ 270.1, 270.14. EPA has the authority to call in the Part B at any time. *Id.*[2] The facility owner or operator has six months from the date of EPA's request to submit the technical information[3] required by the Part B application. *Id.* § 270.1(b). "Failure to furnish a requested Part B application on time, or to furnish in full the information required by the Part B application, is grounds for termination of interim status under Part 124." 40 C.F.R. § 270.10(e)(5) (1984). No later than 15 days after termination of interim status, a closure plan must be submitted to the Regional Administrator. *Id.* § 265.112(c).

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[2] Section 213 of the Hazardous Waste Amendments of 1984 amended section 3005(e) of RCRA, 42 U.S.C. § 6925(e), to require submission of the Part B application by a certain date (depending upon the type of facility) if EPA has not already called in the application by that date.

[3] The Part B application requires information such as how the facility will meet the requirements of 40 C.F.R. Part 264; a general description of the facility; a description of the security procedures at the facility; a copy of the contingency plan to minimize hazards to human health or environment from fires, explosions or unplanned release of hazardous waste; and closure plans. *Id.* § 270.14.

II. Factual Background.

The debtor, Commonwealth Oil Refining Company ("CORCO"), is the owner and operator of a HWM facility at Penuelas, Puerto Rico. On August 13, 1980, CORCO informed EPA that it conducts activities at the facility involving "hazardous waste," as defined in section 1004(5) of RCRA, 42 U.S.C. § 6903(5) and in 40 C.F.R. § 261.3. On November 18, 1980, CORCO submitted a completed Part A permit application, thereby obtaining interim status.

On October 14, 1982, the Administrator of the EPA authorized Puerto Rico to operate "Phase I" of the hazardous waste program (including regulation of interim status facilities) in lieu of the federal program, pursuant to section 3006(b) of RCRA, 42 U.S.C. § 6926(b). 47 Fed. Reg. 45,880 (Oct. 14, 1982). To implement Phase I, Puerto Rico has promulgated Regulations for the Control of Hazardous and Non-Hazardous Solid Waste pursuant to the Puerto Rico Public Policy Environmental Act, P.R. Laws Ann. tit. 12, § 1121 *et seq.* Although Puerto Rico operates its own program, section 3008 of RCRA, 42 U.S.C. § 6928, authorizes EPA to enforce the provisions of the Commonwealth's program. EPA also operates "Phase II" of the hazardous waste program in Puerto Rico, which includes the authority to issue RCRA permits. 40 C.F.R. § 271.128 (1984).

On April 12, 1984, EPA called in CORCO's Part B application and set a due date for filing of October 12, 1984. On July 11, 1984, CORCO filed for bankruptcy and on December 13, 1984, CORCO, as debtor-in-possession, moved for an automatic stay or in the alternative a section 105(a) stay of any RCRA enforcement action that has been or will be taken by EPA.

EPA, at this time, intends to file an administrative complaint against CORCO pursuant to RCRA for violations of the

Commonwealth of Puerto Rico Public Policy Environmental Act and sections 3004 and 3005 of RCRA, 42 U.S.C. §§ 6924, 6925, and regulations promulgated under both statutes. The thrust of EPA's enforcement action is that CORCO must either file the Part B permit application or else forfeit interim status and file a closure plan. CORCO does not contend that EPA is wrong on the substantive environmental issues. Rather, it seeks to dalay indefinitely the decision on whether to file the Part B or a closure plan.

III. Discussion

a. The Automatic Stay Provision Of The Bankruptcy Code Is Inapplicable To EPA's Enforcement Action

The filing of a bankruptcy petition operates as an automatic stay of any proceeding against the debtor. 11 U.S.C. § 362(a). EPA's potential enforcement action, however, is designed to obtain CORCO's compliance with hazardous waste, storage and disposal regulations and falls squarely within the exception to the automatic stay codified at 11 U.S.C. § 362(b)(4). That section provides:

> (b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay —
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> . . .
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> (4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power . . . .

Furthermore, subsection (b)(5) provides that the petition does not stay "the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a

governmental unit to enforce such governmental unit's police or regulatory power."

The intent underlying subsections (b)(4) and (5) is clarified in the legislative history of the Bankruptcy Reform Act of 1978 ("Bankruptcy Code"). Both the Senate and House reports provide as follows:

> Paragraph (4) [11 U.S.C. § 362(b)(4)] excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, *where a governmental unit is suing* a debtor *to prevent or stop violation of* fraud, *environmental protection*, consumer protection, safety, *or similar police or regulatory laws*, or *attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.*
> Paragraph (5) [11 U.S.C. § 362(b)(5)] makes clear that *the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment*, but does not extend to permit enforcement of a money judgment (emphasis added).

S. Rep. No. 989, 95th Cong., 2d Sess. 52, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5838; H.R. Rep. No. 595, 95th Cong., 2d Sess. 343, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6299.

The House Report to the Bankruptcy Code went on to state that environmental enforcement actions, such as the one at bar, should not be subject to the automatic stay provision:

> Under present [pre-Code] law there has been some overuse of the stay in the area of governmental regulation. For example, in one Texas bankruptcy court, the stay was applied to prevent the State of Maine from closing down one of the debtor's plants that was polluting a Maine River in violation of . . . [State law.] The bill [the 1978 Code] excepts these kinds of actions from the automatic stay . . . .

H.R. Rep. No. 595, 95th Cong., 2d Sess. 174-75, *reprinted in* 1978 U.S. Code Cong. & Ad. News 6135-36.

The action which EPA is seeking to institute is precisely the type of proceeding Congress intended to exempt from the stay. The RCRA requirements are designed to protect the environment. Congress expressly stated in RCRA that "[t]he objectives of this chapter are to promote the protection of health and environment and to conserve valuable material and energy resources by . . . (4) regulating the treatment, storage, transportation, and disposal of hazardous wastes which have adverse effects on health and the environment . . . ." Section 1003, 42 U.S.C. § 6902.

United States District Judge Dickinson R. Debevoise in the District of New Jersey recently recognized in an unpublished order "that EPA's issuance of administrative orders or initiation of other action pursuant to Section 7003 [of RCRA] . . . to protect public health and welfare and the environment also constitutes a valid exercise of the police power of the United States." *In re Bayonne Barrel & Drum Co., Inc.,* No. 82-0474, slip op. at 1 (D.N.J. July 17, 1984). He therefore held EPA's enforcement action under section 3008 to be exempt from the automatic stay. *Id.* The United States District Court for Puerto Rico, where CORCO's facility is located, has also recognized that:

> The Bankruptcy Court has no express congressional authority to intervene in environmental matters. Congress did not give the Bankruptcy Court exclusive jurisdiction over *all* controversies that in some way affect the debtor's estate . . . Congress has recently recognized in an express fashion its intention that public interest regulations are to outweigh that of the Bankruptcy Act and Rules in case of conflict.

Matter of Canarico Quarries, Inc., 466 F. Supp. 1333, 1339 (D.P.R. 1979) (emphasis in original).

The propriety of EPA's acting to ensure that the conditions at CORCO's facility are remedied was confirmed in *Penn Terra Ltd. v. Dep't of Envt'l. Resources,* 733 F.2d 267 (3d Cir. 1984), in which the automatic stay provision of 11 U.S.C. § 362 was determined to be inapplicable to a suit to remedy environmental hazards brought by the Pennsylvania Department of Environmental Resources ("DER"). The Court stated:

> DER seeks to force Penn Terra to rectify harmful environmental hazards. No more obvious exercise of the State's power to protect the health, safety, and welfare of the public can be imagined. Indeed, both the Senate and the House committee reports on the Bankruptcy Reform Act explicitly acknowledge environmental protection as part of the State's police power.

Id. at 274.

IV. The United States Supreme Court's Decision In *Ohio v. Kovacs* Supports The Government's Attempt To Bring CORCO Into Compliance With The Environmental Laws.

The United States Supreme Court recently approved of the approach taken by the *Penn Terra* court. In *Ohio v. Kovacs,* 105 S. Ct. 705 (1985), the Court stated that the automatic stay provision did not apply to suits to enforce the regulatory statutes of a state. *Id.* at 711 n.11. It noted that in *Penn Terra* the State's effort was held to be directed at enforcing an injunction to require compliance with environmental law, not an effort to enforce a money judgment. *Id.* The Court also stated that anyone in possession of the property of the bankrupt estate had to comply with the State's environmental laws.

Id. at 711-12. *Kovacs* therefore confirms that the automatic stay is inapplicable to EPA's enforcement action.

In *Kovacs*, the Supreme Court addressed whether, under the circumstances of the case before it, an injunction could be a "debt" or "liability on a claim" subject to discharge under the Bankruptcy Code. In that case, the State of Ohio sued Kovacs, the chief executive officer and stockholder of the Chem-Dyne Corporation, and several other business entities, for polluting public waters, maintaining a nuisance and causing fish kills in violation of state environmental laws. In 1979, Kovacs, both on behalf of Chem-Dyne, and in his individual capacity, signed a stipulation and judgment entry settling the action. In addition to prohibiting certain actions, the stipulation required defendants to remove certain wastes from the Chem-Dyne hazardous waste disposal site and ordered the payment of $75,000 in compensation to the State for wildlife injury. *Id.* at 707. Kovacs and the other defendants failed to comply with their obligations under the injunction. The State then obtained the appointment of a receiver, who took possession of the site and began implementing the judgment entry by commencing to clean up the site. Prior to completion of this task, Kovacs filed for personal bankruptcy. *Id.*

In order to develop a basis to require application of part of Kovacs' postbankruptcy income to be applied to the receivership's task, the State filed a motion in State court to discover Kovacs' current income and assets. At Kovacs' request, the Bankruptcy Court stayed those proceedings. The State then filed a complaint in the Bankruptcy Court seeking a declaration that Kovacs' obligation under the stipulation to clean up the Chem-Dyne site was not dischargeable as a "debt" or a liability on a "claim." The complaint also sought an injunction against the bankruptcy trustee to restrain him from pursuing any action to recover Kovacs' assets held by the receiver. Both

the Banktruptcy Court and the District Court ruled against the State. The Sixth Circuit affirmed and held that Ohio was essentially seeking a monetary payment from Kovacs and that such a payment was a liability on a claim, which was dischargeable. *Id.* at 707-708.

The United States Supreme Court agreed with the Sixth Circuit and held that the injunction in question represented an attempt to enforce a money judgment and was therefore a claim pursuant to 11 U.S.C. § 101(4)(B), which was dischargeable. The Court made clear, however, that its decision was limited to the facts of the case. The Court noted that "[a]s we understand it, the Court of Appeals held that, *in the circumstances,* the cleanup duty had been reduced to a monetary obligation" and that "*on the facts before it,* and with the receiver in control of the site, we cannot fault the Court of Appeals for concluding that the cleanup order had been *converted* into an obligation to pay money, an obligation that was dischargeable in bankruptcy." *Id.* at 710-11 (emphasis added).

The Supreme Court made it unequivocally clear that it was the dispossession of Kovacs' assets and the appointment of a receiver that turned the injunction into a dischargeable money obligation. *Id.* at 710-11 & n.11. The Court noted that Ohio, instead of prosecuting Kovacs under the environmental laws — as EPA intends to do in this case —

> secured the appointment of a receiver, who was ordered to *take possession of Kovacs' nonexempt assets* as well as the assets of the corporate defendants and to comply with the injunction entered against Kovacs . . . it *dispossessed* Kovacs, removed his authority over the site, and divested him of assets that might have been used by him to clean up the property. Furthermore, when the bankruptcy trustee sought to recover Kovacs' assets from the receiver, the latter sought an injunction against such action. Although Kovacs had been

> ordered to "cooperate" with the receiver, he was disabled by the receivership from personally taking charge of and carrying out the removal of wastes from the property. *What the receiver wanted* from Kovacs after bankruptcy *was the money* to defray cleanup costs. At oral argument . . . the State's counsel conceded that after the receiver was appointed, *the only performance sought* from Kovacs *was the payment of money.*

Id. at 710 (emphasis added).

The above discussion makes clear that absent divestiture of Kovacs' funds, compliance with the injunction would nonetheless have been required. It was the method utilized by the State to obtain clean-up that the Court found objectionable. This is borne out by the Court's discussion of the Third Circuit's *Penn Terra* decision. *Id.* at 711 n.11. The Court distinguished *Penn Terra* by pointing out that in that case there was neither the appointment of a receiver, nor was the State seeking money from the bankrupt. *Id.* Yet in *Penn-Terra*, the Third Circuit recognized that institution of the injunctive relief might necessitate the expenditure of money:

> Were we to find that any order which requires the expenditure of money is a "money judgment," then the exception to section 362 for government police action, which should be construed broadly, would instead be narrowed into virtual nonexistence. Yet we cannot ignore the fundamental fact that, in contemporary times, almost everything costs something. An injunction which does not compel some expenditure or loss of monies may often be an effective nullity.

733 F.2d at 277-78.

The Supreme Court's implied approval of *Penn Terra* makes it apparent that the Supreme Court is not concerned with the expenditure of money by the estate required to bring it into

compliance with the environmental laws, but rather with the dispossession of the estate's property by the sovereign in an attempt to carry out an injunction. That this is the proper interpretation of the Court's opinion is borne out by the Court's statement that "we do not suggest that Kovacs' discharge will shield him from prosecution for having violated the environmental laws . . . ." The Court also emphasized that upon Kovacs' failure to comply with the injunction, an environmental enforcement action or civil or criminal contempt proceedings could have been brought by the State, *id.*, and that anyone in possession of the site had to comply with Ohio's environmental laws. *Id.* at 711-12. "Plainly, that person or firm may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such condition. *As this case comes to us,* however, Kovacs has been dispossessed and the State seeks to enforce his cleanup obligation by a money judgment." *Id.* at 712 (emphasis added). It is, of course, impossible to comply with the environmental laws without expending money. The Supreme Court recognized this point and discussed a trustee's options when it is determined that the estate's property is worth either more or less than the cost of bringing it into compliance with the environmental laws. *Id.* at 711 n.12. The Court specifically refers to the "cost of bringing [the property] into compliance with state law," thereby recognizing that compliance requires the expenditure of money. This further underscores that it is not the bankrupt's duty to spend money to comply with the environmental laws that is dischargeable in bankruptcy, but rather a State's attempt to obtain compliance by enforcing a money judgment.

EPA has made it clear that it in no way intends to seek to bring CORCO into compliance with the applicable environmental laws and regulations by dispossessing CORCO of its assets or by seeking compliance via a money judgment. EPA further does not intend to seek either the appointment of a receiver or

the execution of a money judgment against CORCO.[4] Rather, EPA is seeking to bring CORCO into compliance with the federal environmental laws and the hazardous waste regulations of the Commonwealth of Puerto Rico. Without submission of the Part B application, compliance with interim status requirements, or submission of a closure plan, CORCO will continue to be in violation of the environmental laws. Under *Kovacs,* CORCO may not avoid these requirements. *Id.* at 711-712. Furthermore, as previously noted, *Kovacs* held that the automatic stay provision does not apply to suits to enforce a State's regulatory statutes. *Id.*at 711 n.11.

V. CORCO Is Not Entitled To A Stay Under 11 U.S.C. § 105.

In the alternative to the automatic stay, CORCO has moved for a stay of proceedings under 11 U.S.C. § 105 to afford it "a reasonable time to reach a management decision, and if it then so chooses, to file a permanent [Part B] Permit Application." CORCO can no longer maintain that it is entitled to a section 105(a) stay.

Section 105(a) provides that "the bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Stays under section 105(a) are not, however, routinely granted. The legislative history of the Bankruptcy Code clarifies that section 105(a) stays are only granted "under the usual rules for the issuance of injunction . . . . " S. Rep. No. 989, 95th Cong. 2d Sess. 51, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5837; H.R. Rep. 595, 95th Cong., 2d Sess. 342, *reprinted in* 1978 U.S. Code Cong. & Ad. News 6298. One of the four prerequisites in

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[4] Counsel for EPA has informed the Court that the Agency will not seek the entry of a money judgment.

this circuit for the issuance of an injunction is "a substantial likelihood that the movant will prevail on the merits." *Southern Monorail Co. v. Robbins & Myers,* 666 F.2d 185, 186 (5th Cir. 1977). Yet CORCO has conceded this element. Specifically, the debtor-inpossession has noted that "CORCO does not assert that the EPA is wrong, or that it is acting in an arbitrary and capricious manner with respect to the substantive environmental issues . . . ." Moreover, Pedro A. Rios Santiago, vice-president of CORCO, testified that CORCO has filed neither a Part B nor a closure plan and that the facility has not complied with the requirements of the interim status regulations, such as groundwater monitoring. The Court need not therefore address the remaining three elements for a preliminary injunction or address EPA's remaining arguments why a section 105(a) stay should not be granted.[5]

Finally, the Court wishes to note that Congress has expressly directed in 28 U.S.C. § 959(b) that a debtor-in-possession "shall manage and operate the property in his possession . . . according to the requirements of the valid laws of the State in which such property is situated . . . ." This provision requires CORCO to comply with federal law. *See, e.g., Haberern v. Lehigh & N.E. Ry. Co.,* 554 F.2d 581 (3d Cir. 1977); *Carpenters Local Union No. 2746 v. Turney Woods Products, Inc.,* 289 F. Supp. 143 (W.D. Ark. 1968). Therefore, there is no obstacle to EPA's enforcement action in this case.

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[5] EPA also contends that (1) issuance of a § 105(a) stay would render *Kovacs* a nullity, (2) EPA is immune from suit in this Court, (3) the Court lacks jurisdiction to review the merits of EPA's impending enforcement action, because there has been no final agency action, and (4) the applicability of a § 105 stay is not ripe for review.

For the foregoing reasons, CORCO's Motion for an Automatic Stay or a Section 105(a) Stay is denied. Moreover, EPA may proceed with its RCRA administrative enforcement action.

So Ordered, this 16th day of May, 1985.

Joseph C. Elliott
Bankruptcy Judge